correct copy of the original contract of shipment between Plaintiff Cram and Defendant Railway Company.

Plaintiff objects to the offer as incompetent, irrelevant, immaterial and no proper foundation.

The Defendant offers in evidence the original contract made by and between Plaintiff Cram and Defendant Railway Company, in each and all of the 25 different shipments, but those original contracts not being present in Court to-day, Defendant asks leave to submit same to Plaintiff and counsel so that they can see them, and then to have them made a part of the record.

Objected to as incompetent, irrelevant and immaterial.

By the COURT: They may be received.

Case closed.

(Here follow train sheets, marked pages 109, 110, and 111.)

112 I hereby certify that the foregoing is a true and correct transcript of all the testimony introduced and offered on the trial of the above entitled cause, together with all the objections interposed, with the grounds therefor, the rulings thereon and the exceptions taken thereto during said trial.

H. J. PAUL,
Official Reporter.

Received this proposed Bill of Exceptions for examination and amendment this 5th day of December, 1906, and we return same this 15th day of December, 1906, with proposed amendments attached.

E. J. CLEMENTS.

In the District Court of Garfield County, Nebraska.

WILBER I. CRAM, Plaintiff,
vs.
CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, a Corporation, Defendant.

Now on this 15th day of January, 1907, comes said cause to be heard on the proposed Bill of Exceptions, all the evidence introduced and offered upon the trial of the above entitled cause, and the proposed amendments to the said bill.

The court being fully advised strikes therefrom and dis-
113 allows as a part thereof, each and all of the partly printed and partly written instruments purported to be duplicate live stock contracts, which said contracts are found upon pages 38 to 55 inclusive of said bill of exceptions, for the reason: First that none of said instruments is in any manner identified or shown to be a part of the evidence or proof offered or introduced in evidence on the trial of said cause. Second, that while two of said instruments were produced in court, that none of them were identified or offered in evidence; and with the corrections above made, I hereby approve sign, and deliver the same as the Bill of Exceptions in the above cause, and order that the same be made a part of the record therein. Dated at Burwell, Nebraska, this 15th day of January, 1907.

JAMES N. PAUL,
Judge of the Eleventh Judicial District of Nebraska.

Endorsed: 15148.—Cram v. C. B. & Q. Ry. Co.—Bill of Exceptions. Supreme Court of Nebraska.—Filed Apr. 12, 1907.—H. C. Lindsay, Clerk.

114 And on the same day there was filed in the office of the Clerk of said Supreme Court a certain Præcipe, Assignments of Error and Petition in Error, in the words and figures following, to-wit:

WILBER I. CRAM, Appellee,
vs.
CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, Appellant.

Præcipe, Assignment and Brief of Errors on Appeal, and Petition in Error.

The Chicago, Burlington & Quincy Railway Company as appellant and plaintiff in error, complains of Wilber I. Cram, as appellee and defendant in error, and says that on the 12th day of October, 1906, the appellee recovered a judgment in the sum of $1640.00, and costs of suit taxed against the appellant in the sum of $49.70, in an action then pending in the District Court of Garfield County, Nebraska, in which said appellee was plaintiff and the said appellant was defendant.

A transcript of said judgment, the record and proceedings of the court in said action and the bill of exceptions of the testimony at the trial are attached hereto and filed herewith.

The appellant herein requests that the Clerk of the Supreme Court issue notice of appeal to said appellee as above designated.

The appellant alleges that there is error in said judgment, record and proceedings as follows:

115 1. The court erred in overruling the motion of defendant below for a new trial.

2. The judgment is contrary to law.

3. The judgment is contrary to the evidence and not supported by sufficient evidence.

4. That on the evidence produced at the trial the plaintiff was not entitled to recover judgment against the defendant.

5. The amount of the verdict is excessive, and is not supported by the evidence.

6. The undisputed evidence shows that each of the shipments in question were transported by the defendant in reasonable time and without unnecessary delay, and the defendant company should not be held liable for any damage or penalty on account of any of said shipments, all of which were made on contracts fairly entered into between the plaintiff and defendant upon the agreement of the parties that the company did not undertake to carry said shipments within any specified time nor for any particular market.

7. The findings and judgment are erroneous because there was no fault nor violation of any duty on the part of the defendant company in carrying any of said shipments according to the rules laws and usages governing common carriers of live stock which was all the duty imposed upon the defendant by the laws and constitution of the State of Nebraska.

8. The amount of the recovery in each shipment in this case is a penalty imposed on the defendant regardless of any loss or damage to the plaintiff, and such damage as a penalty cannot be

116 sued for nor recovered by the plaintiff individually, but if it could be enforced at all, it must be recovered as a fine or

penalty and be appropriated to the school fund as is provided by the constitution of the State, Article 8, Section 5.

9. The court erred in its findings and judgment in giving force and effect to the statute of the state assessing the penalty or liqu-ated damages in each one of the shipments complained of, because the penalty fixed is arbitrary and unreasonable, and is recoverable regardless of any failure of duty or neglect on the part of the defendant, and regardless of any loss or damage to the plaintiff, and is an appropriation of the property of the defendant and confiscation of the same to the private use of the plaintiff without due process of law and a denial to it of the equal protection of the law in violation of the provisions of the 14th Article of the amendments of the constitution of the United States, and also in violation of the bill of rights and constitution of this state.

10. The findings and judgment of the court are an impairment of the obligation of the contracts of shipment entered into between the plaintiff and defendant, and a refusal to give effect to such contracts in violation of the provisions of the constitution of the United States, Section 10, Article 1.

11. The findings and judgment of the court are a violation of the provisions of section 1, of article 14, of the amendments of the constitution of the United States, in that they deprive the defendant of its property without due process of law, and deny to it the equal protection of the laws, and are an appropriation of defendant's property to the plaintiff's private use arbitrarily and in violation of said provisions of the constitution of the United
117 States.

12. The Act of the legislature of the State of Nebraska under which appellee seeks to maintain the said cause of action and judgment against this appellant is unconstitutional and void, being an attempt to appropriate the property of one person to the private use of another in the nature of penalties and fines, in violation of Article 8, Section 5 of the constitution of the State of Nebraska.

13. The law passed by the legislature of the State of Nebraska upon which the judgment herein rests, is unconstitutional and void being in direct violation of Section 1, of Article 14 of the Amendments to the constitution of the United States in that it deprives the appellant of its property without due process of law and denies to it the equal protection of the laws, and in violation of Section 10 of Article 1 of the constitution of the United States, because it impairs the obligation of the contracts for shipment of stock as set forth in the appellee's petition and claim as shown and proved on the trial.

14. The court erred in sustaining the motion of appellee to strike out the answer to question 50 on page 10 of the bill of exceptions.

15. The court erred in sustaining the objection of appellee to question 60 on page 11 of the bill of exceptions.

16. The court erred in sustaining the objection of appellee to question number 67 on page 12 of the bill of exceptions.

17. The court erred in sustaining the objection of appellee to question numbered 76, on page 13 of the bill of exceptions.

118 18. The court erred in striking from the proof and bill of exceptions the contracts made between the appellant and appellee for the various shipments of stock complained of as shown by his certificate on page 59, in settling the bill of exceptions in the absence of the appellant, and without notice or knowledge to it in such ruling, after having ruled at the time of the trial that such contracts were properly received in evidence as shown on page 37 of said bill of exceptions.

Wherefore the appellant prays that the judgment of the lower court may be set aside and reversed, and the appellee's cause of action dismissed.

E. M. WHITE,
J. W. DEWEESE &
F. E. BISHOP,
Att'ys for Appellant.

Endorsed: 15148.—Cram v. C. B. & Q. Ry. Co.—Præcipe Brief of Assignments of Error. Petition in Error.—Supreme Court of Nebraska.—Filed Apr. 12, 1907.—H. C. Lindsay, Clerk.

And on the same day there was made to issue out of the office of the Clerk of said Supreme Court a certain Notice of Appeal in the words and figures following, to-wit:

119 *Notice of Appeal.*

THE STATE OF NEBRASKA, *ss:*

To the sheriff of the County of Lancaster.

You are hereby commanded to notify Wilber I. Cram that an appeal has been taken to the Supreme Court of the State of Nebraska by Chicago, Burlington & Quincy Railway Company asking the reversal of a judgment against it rendered on the 12th day of October, A. D. 1906, in a certain cause in the District Court of Garfield County, wherein Wilber I. Cram was Plaintiff, and Chicago, Burlington & Quincy Railway Company was Defendant.

You will make due return of this notice, on or before thirty days after the date hereof.

Witness my hand and the Seal of said Court, at the City of Lincoln, this 12th day of April, 1907.

[SEAL.] H. C. LINDSAY, *Clerk*,
By VICTOR SEYMOUR, *Deputy*.

Endorsed: General No. 15148.—Supreme Court.—State of Nebraska. Wilber I. Cram v. C. B. & Q. Ry. Co.—Notice of Appeal.

And afterwards, to-wit, on the 13th day of April, 1907, said Notice of Appeal theretofore issued out of the office of the Clerk of said Supreme Court was returned and filed in the office of said Clerk with service endorsed thereon in the words and figures following, to-wit:

120 Service of the within Notice of Appeal acknowledged this 13th day of April, 1907.

WILBER I. CRAM, *Appellees*,
By E. J. CLEMENTS, *Attorney*.

Endorsed: Supreme Court of Nebraska—Filed Apr. 13, 1907—H. C. Lindsay, Clerk.

And afterwards, to-wit, on the 13th day of February, 1908, there was filed in the office of the Clerk of said Supreme Court a certain Motion to Dismiss Appeal, Notice and Proof of Service, in the words and figures following, to-wit:

In the Supreme Court of the State of Nebraska.

WILBER I. CRAM, Appellee,
vs.
CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, Appellant.

Motion to Dismiss Appeal.

The appellee, Wilber I. Cram, moves the court to dismiss the appeal in this action for the following reasons, to-wit:

1. The transcript and bill of exceptions in this case were filed in this court on the 12th day of April 1907 and placed upon its docket as number 15148 and will be regularly reached, in its order for trial on the third day of March 1908 but no brief has been served
121 on appellee or his attorney or filed herein, on behalf of appellant holding the affirmative in this appeal.

2. Judgment was entered for appellee by the district court herein on the 12th day of October 1906, the bill of exceptions settled on the 15 day of January 1907 and the appeal docketed in this court on the 12th day of April 1907. No diligence has been used by appellant in perfecting said appeal or effort made to comply with the rules of this court in regard to the filing of briefs herein. This cause will be reached for trial in the regular course on the third day of March 1908 and notice has been given by the clerk of this court that it is proposed to assign it for hearing on said day and less than thirty days, the time allowed by the rules of this court for appellee to prepare and file briefs, remains before the day for said hearing. All of which is shown by the record herein and the affidavit hereto attached and made a part hereof.

WILBER I. CRAM,
By E. J. CLEMENTS,
His Attorney.

STATE OF NEBRASKA,
Lancaster County:

E. J. Clements, being first duly sworn deposes and says, that he was the sole attorney for Wilber I. Cram, appellee in the above en-

titled action when same was tried in the lower court and is the sole attorney for said appellee in this court; that during the month of June 1907, after the time fixed by the rules of this court for filing briefs by appellant herein had expired, affiant called the attention of J. W. Deweese, one of the attorneys for the appellant
122 herein, to the fact that no brief had been filed on behalf of the appellant in this case as required by the rules of this court and told him that affiant intended to file a motion to dismiss the appeal for that reason; that said attorney for appellant dissuaded affiant from filing said motion by stating that briefs would be filed on behalf of appellant herein within a short time; that sometime during the month of October 1907, affiant informed F. E. Bishop, one of the attorneys for appellant herein, of said conversation with said J. W. Deweese and called Mr. Bishop's attention to the fact that no briefs had yet been filed on behalf of appellant; that said Bishop thereupon told affiant that briefs would be prepared and filed on behalf of appellant herein in ample time for affiant to prepare and file briefs on behalf of appellee before this case would be reached; that no brief has been served or filed on behalf of appellant herein up to this date and affiant believes that the record of this case shows, and that it is a fact that no diligence has been used or effort made by appellant or its attorneys to comply with the rules of this court in regard to filing briefs so that the hearing should not be delayed beyond the time that it should be reached in its regular order and course; but that the docketing of this appeal on the last day of the six months allowed by law and the default in filing briefs on behalf of appellant were for the purpose of delaying the hearing and determination of this appeal to the latest possible date.

E. J. CLEMENTS.

Subscribed in my presence and sworn to before me this 13th day of February 1908.

JESSIE M. CROFTON,
[SEAL.] *Notary Public.*

123 In Supreme Court of the State of Nebraska.

WILBER I. CRAM, Appellee,
vs.
CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, Appellant.

Notice of Motion.

The appellant in the above entitled action will take notice that the motion to dismiss the appeal herein will be called for hearing in the Supreme Court, at Lincoln, Nebraska, on February 18th 1908. A copy of said motion is hereto attached.

E. J. CLEMENTS,
Attorney for Appellee.

Received a copy of the foregoing notice, motion and affidavit this 13" day of Feb'y 1908.

FRANK E. BISHOP,
Attorney for Appellant.

Endorsed: 15148—Wilber I. Cram, Appellee, vs. Chicago, Burlington & Quincy Railway Company, Appellant.—Motion to dismiss appeal and notice of same—Supreme Court of Nebraska—Filed Feb. 13, 1908—H. C. Lindsay, Clerk.—E. J. Clements, Attorney for Appellee.

124 And afterwards, to-wit, on the 14th day of February, 1908, there was filed in the office of the Clerk of said Supreme Court a certain Motion to Allow Time to Prepare and Serve Briefs, in the following words and figures *following*, to-wit:

In the Supreme Court, State of Nebraska.

WILBER I. CRAM, Appellee,
vs.
CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, Appellant.

Motion.

The appellant moves the court to allow the appellant 30 days to serve and file its brief, and sufficient time thereafter for the appellee to serve and file his brief before setting the case for hearing, and that it may be taken off the provisional call, as shown by affidavit herewi*ht.*

CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY,
By FRANK E. BISHOP, *Its Attorney.*

STATE OF NEBRASKA,
Lancaster County, ss:

Frank E. Bishop being first duly sworn on oath says in support of the above motion, that he is one of the attorneys for the appellant; that part of the work in preparing the brief in this case was done by Solicitor J. W. Deweese prior to his death, and the affiant has had charge of this case together with the work of the office of said Company at Lincoln since September, 1907, and during said time has been very diligent in his effort to make the brief in this case
125 but on account of the large amount of business, all of which had to receive some attention, the affiant has been unable to complete the brief. No other counsel has had the matter in hand and the affiant is better acquainted with the record and questions than other counsel and is desirous of making the brief. The question is an important one and if the Court will allow the 30 days

from this hearing the appellant will serve and file its brief in that time.

This application is made in order that justice may be done.

FRANK E. BISHOP.

Subscribed in my presence and sworn to before me this 13th day of February, 1908.

S. K. KIER,
Notary Public.

[SEAL.]

The appellee will take notice that this motion will be called for hearing in the Supreme Court at Lincoln, Feb. 18, 1908.

FRANK E. BISHOP.

Received copy of this motion and notice this 13" day of Febr. 1908.

E. J. CLEMONTS,
Attorney for Appellee.

Endorsed: 15148—Wilber I. Cram v. C., B. & Q. Railway Co.—Motion to allow time to prepare and serve briefs.—Supreme Court of Nebraska—Filed Feb. 14, 1908—H. C. Lindsay, Clerk.

126 And afterwards, to-wit, on the 18th day of February, 1908, there was rendered by said Supreme Court and entered of record upon the Journal thereof a certain Order in the words and figures following to-wit:

Supreme Court of Nebraska, January Term, A. D. 1908.

No. 15148.

WILBER I. CRAM, Appellee,
v.
CHICAGO, B. & Q. RY. CO., Appellant.

Appeal from the District Court of Garfield County.

FEB. 18.

This cause coming on to be heard upon motion of appellee to dismiss appeal, was argued by counsel and submitted to the Court upon due consideration whereof, it is by the Court ordered that said motion be, and the same hereby is, overruled.

JOHN B. BARNES,
Chief Justice.

And on the same day there was rendered by said Supreme Court and entered of record upon the Journal thereof a certain Order in the words and figures following, to-wit:

Supreme Court of Nebraska, January Term, A. D. 1908.

No. 15148.

WILBER I. CRAM, Appellee,
v.
CHICAGO, B. & Q. RY. CO., Appellant.

Appeal from the District Court of Garfield County.

FEB. 18.

127 This cause coming on to be heard upon motion of appellant for an extension of time within which to serve and file briefs, was argued by counsel and submitted to the Court; upon due consideration whereof, it is by the Court ordered that appellant serve and file brief by March 9, 1908, or judgment of the District Court will be affirmed for want of briefs.

JOHN B. BARNES,
Chief Justice.

And afterwards, to-wit, on the 13th day of March, 1908, there was filed in the office of the Clerk of said Supreme Court a certain Motion for Extension of Time to File Briefs, Affidavit of E. J. Clements, notice and proof of service, in the words and figures following, to-wit:

In Supreme Court of the State of Nebraska.

WILBER I. CRAM, Appellee,
vs.
CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, Appellant.

Motion.

The appellee moves the court to allow said appellee sixty days in which to serve and file his brief herein before setting said case for hearing and that it may be taken off of the provisional call for the reasons stated in the affidavit hereto attached.

WILBER I. CRAM,
By E. J. CLEMENTS,
His Attorney.

128 STATE OF NEBRASKA,
Lancaster County:

E. J. Clements being first duly sworn deposes and says that he is the only attorney for the appellee in the above entitled case; that appellant did not serve its brief in this case until the 7th day of March, 1908, or nearly seventeen months after the judgment was rendered

in the lower court and nearly eleven months after the filing and docketing of said case in this court; that during the months of June and October, 1906, this affiant called the attention of the attorneys for appellant to the fact that briefs had not been served or filed in this case and urged and insisted that they serve said brief so as to give affiant a reasonable time to prepare his brief herein before the case was set for hearing; that at the time of serving appellant's brief to-wit on the 7th day of March, 1908, affiant was engaged in the trial of the case of Sparks vs. Gage County in the United States Court having been appointed as referee in said case; that the trial of said case has now continued 17 days and it will probably require a large portion of the time between this date and that set for the proposed hearing of the above entitled case to complete the trial of the Sparks case; that the question involved herein is the constitutionality of a statute and in the brief served by appellant many questions have been considered and a large number of cases cited which were not raised or cited in the trial in the District Court and it will require at least sixty days from this date for affiant to properly prepare and serve a brief in this case.

E. J. CLEMENTS.

Subscribed in my presence and sworn to before me this 12th day of March, 1908.

[SEAL.] JESSIE M. CROFTON,
Notary Public.

129 *Notice.*

The appellant will take notice that the foregoing motion will be called for hearing in the Supreme Court at Lincoln, Nebraska, on March 16, 1908.

E. J. CLEMENTS,
Attorney for Appellee.

Received a copy of this motion and notice this 12 day of March 1908.

FRANK E. BISHOP,
Attorney for Appellant.

Endorsed: No. 15148. Motion. Wilber I. Cram, Appellee, vs. Chicago, Burlington and Quincy Railway Company, Appellant. Motion for Extension of Time to File Brief, Affidavit, Notice and Proof of Service. Supreme Court of Nebraska. Filed Mar. 13, 1908. H. C. Lindsay, Clerk. E. J. Clements, Attorney for Appelle.

And afterwards to-wit, on the 17th day of March, 1908, there was rendered by said Supreme Court and entered of record upon the Journal thereof a certain Order in the words and figures following, to-wit:

Supreme Court of Nebraska, January Term, A. D. 1908.

No. 15148.

WILBER I. CRAM, Appellee,
v.
CHICAGO, B. & Q. RY. Co., Appellant.

Appeal from the District Court of Garfield County.

MARCH 17.

130 This cause coming on to be heard upon motion of appellee for time within which to file briefs and for continuance was argued by counsel and submitted to the Court; upon due consideration whereof, it is by the Court ordered that the said motion be, and the same hereby is, sustained; that appellee be allowed until May 16, 1908, in which to serve and file briefs; and that cause be continued to June 2, 1908.

JOHN B. BARNES,
Chief Justice.

And afterwards, to-wit, on the 23rd day of June, 1908, the following among other proceedings were had and done in said Supreme Court, to-wit:

Supreme Court of Nebraska, January Term, A. D. 1908.

JUNE 23.

The following causes were argued and submitted to the Court:

No. —.

* * * * * * *

No. 15148.

CRAM
v.
C., B. & Q. R. R. Co.

Appeal from Garfield County.

JOHN B. BARNES,
Chief Justice.

And afterwards, to-wit, on the 16th day of September, 1908, there was rendered by said Supreme Court and entered of record upon the Journal thereof a certain Order in the words and figures following, to-wit:

131 Supreme Court of Nebraska, September Term, A. D. 1908.

No. 15148.

WILBER I. CRAM, Appellee,
v.
CHICAGO, B. & Q. RY. CO., Appellant.

Appeal from the District Court, Garfield County.

SEPT. 16.

It is by the court ordered that a reargument be had herein; it is further ordered that Mr. B. T. White be, and hereby is given leave to file briefs herein amicus curiæ, same to be served and filed within forty days; counsel for plaintiff to answer same in forty days thereafter.

JOHN B. BARNES,
Chief Justice.

And afterwards, to-wit, on the 28th day of November, 1908, there was filed in the office of the Clerk of said Supreme Court a certain stipulation in re briefs, in the words and figures following, to-wit:

In the Supreme Court of the State of Nebraska.

No. 15148.

WILBER I. CRAM, Appellee,
vs.
CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, Appellant.

Stipulation.

It is hereby stipulated and agreed by and between the parties hereto that the brief filed herein by B. T. White, Amicus
132 Curiæ, shall remain on file and be considered by the court the same as if said brief had been served and filed within the time fixed by the order of the court; that the appellee and the State Railway Commission, Amicus Curiæ, shall have until the 15th day of January, 1909, to serve and file briefs in answer thereto and B. T. White Amicus Curiæ, to reply thereto by Feb. 15, 1909, and that this case shall not be set for hearing before the second session of said court in Feb'y, 1909.

B. T. WHITE, *Amicus Curiæ.*
E. J. CLEMENTS,
Attorney for Appellee.
JAMES E. KELBY AND
FRANK E. BISHOP,
For C., B. & Q. Railway Company.

Endorsed: 15148. Cram v. C., B. & Q. Stipulation in re briefs. Supreme Court of Nebraska. Filed Nov. 28, 1908. H. C. Lindsay, Clerk.

And afterwards, to-wit, on the 1st day of December, 1908, there was filed in the office of the Clerk of said Supreme Court a certain stipulation in re briefs, in the words and figures following, to-wit:

In the Supreme Court of the State of Nebraska.

WILBER I. CRAM, Appellee,
v.
CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, Appellant.

Stipulation.

133 It is hereby stipulated and agreed by and between counsel for the respective parties in the above entitled cause that the attorney general of the state of Nebraska be given until January 19, 1909, within which to file brief on behalf of the Nebraska State Railway Commission, as a friend of the court, and that B. T. White and counsel for appellant be granted until February 15, 1909, within which to file reply brief.

It is further stipulated and agreed that said cause may be set for hearing at the second sitting of the court in February, 1909.

Dated this 24th day of November A. D. 1908.

W. T. THOMPSON,
Attorney General of Nebraska.
JAMES E. KELBY,
F. E. BISHOP,
For Appellant.

Endorsed: No. 15148. In the Supreme Court of the State of Nebraska. Wilber I. Cram, v. Chicago, Burlington & Quincy Railway Company. Stipulation. Supreme Court of Nebraska. Filed Dec. 1, 1908. H. C. Lindsay, Clerk.

And afterwards, to-wit, on the 1st day of December, 1908, there was rendered by said Supreme Court and entered of record upon the Journal thereof a certain order in the words and figures following, to-wit:

134 Supreme Court of Nebraska, September Term, A. D. 1908.

No. 15148.

WILBER I. CRAM, Appellee,
v.
CHICAGO, B. & Q. R. Co., Appellant.

Appeal from the District Court of Garfield County.

DEC. 1.

This cause coming on to be heard upon stipulation of parties for an extension of time within which briefs may be filed herein, and for a continuance, was submitted to the court; upon due consideration whereof, it is by the court ordered that said stipulation be, and the same hereby is, allowed, and cause herein continued to February 16, 1909.

M. B. REESE,
Chief Justice.

135 And afterwards, to-wit, on the 12th day of February, 1909, there was filed in the office of the Clerk of said Supreme Court a certain request of appellant for oral argument, in the words and figures following, to-wit:

CRAM
v.
C., B. & Q. R. Co.

Request of Appellant for Oral Argument.

Endorsed: Supreme Court of Nebraska. Filed Feb. 12, 1909. H. C. Lindsay, Clerk.

And afterwards, to-wit, on the 16th day of February the following among other proceedings were had and done in said Supreme Court, to-wit:

Supreme Court of Nebraska, January Term, A. D. 1909.

FEB. 16.

The following causes were argued by counsel and submitted to the Court:

No. 15148.

CRAM
v.
C., B. & Q. R. Co.

No. —. (Reargument) Appeal Garfield.

M. B. REESE,
Chief Justice.

And afterwards, to-wit, on the 11th day of June, 1909, there was rendered by said Supreme Court and entered of record upon the Journal thereof a certain judgment in the words and figures following, to-wit:

136 Supreme Court of Nebraska, January Term, A. D. 1909.

No. 15148.

WILBER I. CRAM, Appellee,
v.
CHICAGO, B. & Q. R. Co., Appellant.

Appeal from the District Court of Garfield County.

JUNE 11.

This cause coming on to be heard upon appeal from the District court of Garfield County, was argued by counsel and submitted to the court; upon due consideration whereof, the court doth find error apparent in the records of the proceedings and judgment of said district court; it is therefore, considered, ordered and adjudged that unless the plaintiff within thirty days remits from the said judgment recovered in said district court, the sum of two hundred forty dollars, as of the date said judgment was so entered, this case will be reversed and cause remanded for further proceedings, appellee to pay all costs herein taxed at $—; but if such remittitur be so filed as aforesaid then the judgment of the district court will be affirmed, and in that event each party shall pay his own costs, as follows: appellee's taxed at $—, and appellant's taxed at $—; for all of which execution is hereby awarded, and that a mandate issue accordingly.

JOHN B. BARNES,
Acting Chief Justice.

And on the same day there was filed in the Office of the Clerk of said Supreme Court a certain Opinion by said Court, pursuant
137 to which the preceding judgment was entered, which opinion is in words and figures following, to-wit:

138 No. 15148.

CRAM
v.
CHICAGO, B. & Q. R. Co.

Opinion Filed June 11, 1909.

1. Sections 10606 and 10607, Cobbey's Annotated Statutes, 1907, being chapter 107, Laws of Nebraska, 1905, do not contravene sections 11 or 15 of article 3 of the constitution of Nebraska, nor is said

legislation repugnant to the fourteenth amendment to the constitution of the United States.

2. The defendant having failed to prove, or offer to prove, any affirmative defense to an action under said statute, save and except that as to its delay in forwarding one car load of stock it did so in deference to the statute prohibiting the operation of trains on Sunday, and defendant having been given by this court the benefit of said defense, it is unnecessary to determine whether the statute precluded any other defense in said action.

3. The legislature may provide by general law that a shipper of live stock may recover liquidated damages from a public carrier for failure to transport such stock committed to the carrier for transit between stations in Nebraska.

4. Section 4 of article 11 of the constitution does not prohibit the legislature from increasing the common law liability of common carriers, and in case the legislature expands such liability,
139 the courts will not declare the statute void on the complaint of the carrier, because in some hypothetical case the law, if applied, might work to the disadvantage of a shipper.

5. The statute does not interfere with or regulate inter-state commerce.

6. Where the evidence disclosed without dispute that as to one cause of action the delay was occasioned by unloading the stock for feed, water and rest at the feeding pans of defendant at a division point, and that to have continued the shipment to the point of destination would have probably compelled the carrier to have operated its trains on Sunday and have resulted in the delivery of said stock on the Sabbath, a judgment based on said count in the petition will be reversed.

140 ROOT, *J.*:

Action under chapter 107, Laws of Nebraska, 1905, being sections 10606 and 10607, Cobbey's Annotated Statutes, 1907. Judgment was rendered in favor of plaintiff and defendant appeals.

This case has been elaborately briefed and exhaustively argued by counsel for the respective litigants and by friends of the court, but more attention has been given to the validity of the statute than to the facts in the instant case. The act is as follows: Section 10606. "It is hereby declared and made the duty of each corporation, individual, or association of individuals, operating any railroad as a public carrier of freight in the State of Nebraska, in transporting live stock from one point to another in said state in car load lots, in consideration of the freight charges paid therefor, to run their train conveying the same at a rate of speed so that the time consumed in said journey from the initial point of receiving said stock to the point of feeding or destination, shall not exceed one hour for each eighteen miles travelled including the time of stops at stations or other points, Provided, in cases where the initial point is not a division station and on all branch lines not exceeding 125 miles in length, the rate of speed shall be such that not more than one hour

shall be consumed in traversing each twelve miles of the distance including the time of stops at stations or other points, from the initial point to the first division station or over said branches.
141 The time consumed in picking up and setting out, loading or unloading stock at stations, shall not be included in the time required, as provided in this schedule.

Provided, further, that upon branch lines not exceeding 125 miles in length live stock of less than six cars in one consignment, each railway company in this state may select and designate three days in each week as stock shipping days, and publish and make public the days so designated and after giving ten days' notice of the days so selected and designated, shall be required upon its branch lines to conform to the schedule in this act provided, only upon said days so designated as stock shipping days."

Section 10607. "Any individual, corporation, or association of individuals, violating any provisions of this act shall pay to the owner of such live stock, the sum of ten dollars for each hour for each car it extends or prolongs the time of transportation beyond the period herein limited as liquidated damages to be recovered in an ordinary action, as other debts are recovered."

1. It is argued that the legislature in enacting said statute violated section 11, article 3 of the constitution because the law, if given effect, amends sections 10596, 10597 and 10598, Cobbey's Annotated Statutes, 1907, and the act of 1905 does not mention or repeal the statutes thus amended.

The act under consideration is complete in itself, and although it may conflict somewhat with section 10597, supra, it will not
142 for that reason be held void, as the earlier act must yield to the later. State v. Omaha Elevator Company, 75 Neb., 637; Bryant v. Dakota County, 53 Neb., 755. The act of 1905 does not in any manner modify sections 10596 or 10598, supra.

2. It is next suggested that the statute deprives a railway company of the equal protection of the law in that it forecloses any defense that might reasonably exist in the carrier's favor and provides for the payment of an arbitrary sum to the shipper under certain conditions without regard to whether he is damaged or not, and thereby provides for the taking of the railway's property without due process of law. As to the first of the last stated propositions, defendant is in the peculiar position of urging that it is without a defense, the statute being considered and the court, not having the assistance of counsel on this branch of the law, will not exhaustively consider the question.

The statute does not contain any exceptions and defendant argues that neither the act of God nor inevitable accident would excuse it for failure to deliver a car load of stock within the time limit. Although we do not agree with counsel, it is unnecessary to inquire concerning what facts would be a lawful excuse for a carrier in a suit like the one at bar. A statute will be read in connection with all other enactments upon that subject. State v. Omaha Elevator Company, 75 Neb., 637; In re Hastings Brewing Com-
143 pany, — Neb., —, 119 N. W. 27; section 448, 2 Lewis' Sutherland Statutory Construction (2nd ed.). It is also a truism

that "When statutes are made there are some things which are exempted and fore-prized out of the provisions thereof, by the law of reason, though not expressly mentioned: thus, things for necessity's sake, or to prevent a failure of justice, are excepted out of statutes." 5th Rule, Dwarris Maxims, page 123, Potter's Dwarris on Statutes and Constitutions.

It was held in United States v. Kirby, 7 Wall. (U. S.), 482, 486, that although the statute providing a penalty for interfering with the transmission of the mails did not contain any exception, yet an officer might lawfully arrest a mail carrier upon a warrant charging him with the crime of murder. See also Tsoi Sim v. United States, 54 C. C. A., 154; State v. Barge, 82 Minn., 256; State v. Rollins, 80 Minn., 216.

In Sullivan Savings Institution v. Sharp, 2 Neb. (Unof.), 859, 96 N. W., 522, it was held that a mortgagee was not liable in liquidated damages for refusing to cancel a mortgage if the right of the person making the demand was not clear. The statute does not deny the carrier the right to defend an action brought thereon, nor state what, if any, defenses may or may not be avilable in such a case. Defendant will not be in position to complain in this particular until in a concrete case wherein it has presented and maintained or offered to maintain, a legitimate defense, the courts have determined that the statute denies the carrier that right. Whitehead v. Wilmington & Weldon Ry. Co., 87 N. C., 255; Allen v. Texas & Pacific Ry. Co., 101 S. W. (Texas), 792.

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Concerning the claim that the enforcement of the statute will amount to the taking of defendant's property without due process of law, it may be broadly stated that the carrier is not situated with reference to the public, and the statute, as natural persons engaged in the ordinary vocations in life are with reference to each other. A speed of twelve or eighteen miles an hour for defendant's freight trains is not prima facie unreasonable, because defendant's testimony shows that it operated said trains on some parts of its railway at the rate of thirty miles per hour. It may be expensive for the railway in every instance to maintain the average speed demanded by the statute. A car of live stock transported from a branch line to a division may not reach the latter station in time to be included within a freight train going in the desired direction on the main line, and to devote a locomotive exclusively to the one car for any considerable distance would entail a considerable expense for the carrier. However, the railway company is permitted to charge remunerative rates for the transportation of freight; its methods of bookkeeping and of collecting and tabulating statistics are such that it can with reasonable exactitude ascertain the cost to it and a fair charge to the shipper of transporting any particular property. If the legislature has by regulating the service increased the expense of transporting live stock in Nebraska and to comply with the statute will wipe out a reasonable margin of profit for the carrier on all of its intrastate business, it has ample recourse in an increase of rates, so that in the end, viewed as a general proposition, the enforcement of the

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law to the extreme suggested by defendant's learned counsel, will not deprive the carrier of any just profit nor take its property without due process of law. In the instant case the enforcement of the law, as we view the record, will not deprive defendant of any constitutional guarantee, State or National. Defendant's property is affected by a public interest and having devoted that property to a use in which the public have an interest, it must, to the limit of the interest thus acquired by the public, submit to the control of such property for the public good. The City of Rushville v. The Rushville N. & G. Co., 132 Ind., 575, 584; Chicago, B. & Q. Ry. Co. v. Iowa, 94 U. S., 155. The public is interested not only in being permitted to have its property transported for a reasonable compensation, but also in having that property, especially if subject to rapid depreciation, transported with reasonable promptness and care.

Before the enactment of this statute the carrier was liable in damages to the shipper if it unnecessarily and unreasonably delayed the transportation of live stock committed to its possession for carriage. Nelson v. Chicago, B. & Q. Ry. Co., — Neb., —, 110 N. W., 741; Denman v. Chicago, B. & Q. Ry. Co., 52 Neb., 140, 143. The legislature in passing from the subject of compensation to that of service, kept well within its constitutional rights and the inquiry
146 should be confined to ascertaining whether the operation of the law will impose such an undue burden upon the carrier as to take from it something for which the public will not give an adequate return. It is a matter of common knowledge that live stock confined in a freight car deteriorates in condition and that, if the animals are to be placed on the market within a short time of the termination of transportation, the depreciation is not confined to a shrinkage in weight, but to many other factors difficult to prove, but actually existing and seriously affecting the market value of said property. As the damage accruing from the protracted confinement of stock is difficult to prove with reasonable exactitude and yet always exists, the legislature has the power to provide for liquidated damages. Such legislation is not unsound in principle and has been upheld in many courts.

Section 4966 of the Revised Statutes of the United States, provides that one who publicly performs a dramatic composition without the permission of the owner of the copyright thereof, if it has been copyrighted, shall be liable in damages in at least one hundred dollars for the first performance and fifty dollars for each subsequent production. In Brady v. Daly, 175 U. S., 148, the statute was upheld, not as a penalty because it was said only the owner of the copyright may bring the action, nor as a punishment to the wrongdoer, but as a reasonable liquidation of the damages which the proprietor had suffered from the wrongful acts of the defendant. So also where the
147 statute provided for a flat recovery of a stipulated sum for the negligent killing of a person, the act was held not to deprive defendant of property without due process of law. It might be that substantial damages had not accrued to the plaintiff in a particular case; in some instances the damage would be insignificant and in others, death would relieve the plaintiff of a pecuniary bur-

den. Under that statute it would not avail the defendant to plead and offer to prove that the deceased was a helpless cripple, or in the last stages of tuberculosis, nor would it be heard to say that its property was in danger of being taken without due process of law. Coover v. Moore & Walker, 31 Mo., 574, 576; Carroll v. Missouri P. Ry. Co., 88 Mo., 239. Counsel for defendant argue that the statute purports to give more than compensatory damages and therefore is controlled by Railroad Company v. Baty, 6 Neb., 37, but that case merely disapproved a statute that purported to give double damages, and if the act under consideration provided for the recovery of double or treble damages, we would not hesitate to apply the earlier case to the instant one. Such is not the case. On more than one occasion we have upheld the right of the legislature to liquidate damages that may arise from the default of a person under circumstances which preclude the ascertainment of the actual damages suffered by the aggrieved person. In Graham v. Kibble, 9 Neb., 182, a recovery of the statutory damages of fifty dollars against a public officer for collecting a greater fee for his official services than
148 the law prescribed, was affirmed. In Clearwater Bank v. Kurkonski, 45 Neb., 1, the statute permitting a mortgagor to recover from the mortgagee fifty dollars liquidated damages for failing to release a chattel mortgage after it had been fully paid, was sustained, and in Hier v. Hutchins, 58 Neb., 334, we approved the statute providing for the recovery of five hundred dollars against an officer if he re-arrest a person that had been discharged on a writ of habeas corpus for the same offense as that described in the officer's warrant. Counsel distinguish those cases relating to public officers for the alleged reason that the legislature may subject the occupant of a public office to damages for particular unlawful acts committed in the conduct thereof. Although the legislature may not prohibit the carrier from transacting business, yet it may regulate the affairs of that public servant, and much of the reason for sustaining the power of the legislature to provide that public officers shall pay a definite sum as liquidated damages for acts of commission of omission, applies to like provisions in statutes passed to regulate public carriers in the transaction of their business.

3. It is argued that the constitution of the state provides that the "liability of railroad corporations as common carriers shall never be limited"; that the shipper might suffer a greater damage by reason of delay in the transportation of his stock than he could recover under the act in question; that the statute would prevent the shipper from recovering his actual damage, and therefore is void
149 for that reason. Such a condition could not prejudice the defendant and it cannot litigate a shipper's rights in a hypothetical case that may never be presented to this court. Commonwealth v. Wright, 79 Ky., 22; State v. Becker, 51 N. W. (S. Dak.), 1018; Lake S. & M. S. R. Co. v. Ohio, 173 U. S., 285, 308.

4. Defendant asserts that many of the shipments complained of were carried in interstate trains and that the statute interferes with interstate commerce, and cite Houston v. Mayes, 201 U. S., 321. Counsel have not referred to any admission in the pleadings or to

a syllable of testimony that will sustain the claim advanced; all of the stock was transported between points within the state and no part of the route travelled extended beyond the borders of Nebraska. The United States Supreme Court in Houston v. Mayes, supra, considered an interstate shipment and only determined that the Texas statute was invalid in so far as it might be applied thereto and subsequently the law was held valid as applied to intrastate shipments. Allen v. Texas & P. R. Co., 101 S. W. (Texas), 792. Nor would we concede that by including the cars in a train made up partially of cars which contained property consigned to points without the state of Nebraska, defendant could avoid the statute so far as the intrastate shipments were concerned. Hennington v. State of Georgia, 163 U. S., 299, 317.

5. It is suggested that the statute is class legislation and inimical to section 15 of article 3 of the constitution. The act operates
150 uniformly upon all persons coming within the class and the classification has reason to justify its existence. The greater part of freight is inanimate, much of it will not depreciate if delayed somewhat in transportation, but live stock, peculiarly of all perishable freight, must be handled expeditiously to preserve its value. Vegetables, if kept warm in winter, will not deteriorate if leisurely transported; fresh fruit, meat and dairy products if chilled and kept at a proper temperature may be delayed in transit during the warm weather and still arrive fresh and wholesome at the point of destination, but regardless of the season or weather, speed is an essential element in the proper transportation of live stock by the carrier. We conclude that the law does not violate said section of the constitution. Cleland v. Anderson, 66 Neb., 252.

6. As to the first cause of action, plaintiff was permitted to recover for a delay of twenty-four hours in the shipment of one car of stock. It is undisputed that said stock was shipped from Burwell in the forenoon of Saturday, the 1st of July; that in the regular course of transit it would pass through the city of Lincoln where defendant maintains extensive yards and pens for feeding, watering and resting stock; that plaintiff's stock arrived at said point at 10:30 p. m. of said Saturday, which was within the time fixed by the statute and was unloaded, fed and retained until Sunday night when they were forwarded to South Omaha. Therefore, out of the twenty-four hours' delay in said shipment for which plaintiff re-
covered judgment, twenty-three hours and fifteen minutes
151 may be accounted for by said stop at the feed yards. If this time may be deducted, there was less than one hour delay in said shipment and plaintiff would not be entitled to recover therefor. The statute only binds the carrier to maintain the minimum rate of speed between the initial point "of receiving said stock to the point of feeding or destination." Defendant was within the letter of the law. Furthermore the cattle were fed at Lincoln and the time consumed there should not in our judgment have been charged against the carrier. We are of opinion that defendant was not required to continue running its train on Sunday nor to deliver the stock at or about twelve o'clock Saturday night, and that it

might with propriety have refused so to do without incurring a bill for damages; to that extent, at least, a defense was presented and plaintiff should not have recovered on his first cause of action.

There is some evidence in the record to the effect that one car of stock was transported from Ashland to South Omaha via Fort Crook, a somewhat longer route than by Gretna; that the grades on the former line are lighter than on the latter and this fact and a congestion of trains on the Gretna route, impelled the choice of the Fort Crook line. The pleadings however do not admit the consideration of this extra mileage, which we are of opinion might have been considered had a proper issue been presented. There is also some evidence that at the stations intermediate Burwell and South Omaha, some time was consumed in setting out and
152 picking up stock, for which defendant would have been entitled to credit had there been anything tangible and definite in the testimony on said point, but in the condition of the record, neither the district court nor this court can find that on any particular shipment any definite deduction should have been made.

There is also considerable evidence tending to show, as a general proposition, that in the management of its traffic defendant is compelled to sidetrack trains and wait for passing trains; that defendant has installed a block service on its main line and must at times delay a train until the one preceding it going in the same direction has cleared the block before the former may be permitted to enter it, but no one can apply this evidence so as to find as a matter of fact that as to any of the shipments a delay for any definite period was occasioned by the natural results of a careful operation of defendant's trains. It will, therefore, be unnecessary to consider whether those facts, if properly presented, would have constituted a defense to this action.

The judgment entered, to the extent of two hundred forty dollars, is excessive. Therefore, unless the plaintiff within thirty days of the filing of this opinion remits from the judgment recovered in the district court, the sum of two hundred forty dollars as of the date said judgment was entered, this case will be reversed and the cause remanded for further proceedings, but if such remittitur is filed as aforesaid, the judgment of the district court will be
153 affirmed and in that event each party will pay its own costs in this court.

FAWCETT, *J.*, concurring:

I concur in the majority opinion, but only upon the ground that we are concluded by numerous former decisions of this court upon kindred questions. I have always questioned the power of the legislature arbitrarily to determine that one party to a civil contract shall, in the event of a failure on his part to perform some condition thereof, pay to the other party damages which such other party has not sustained. To my mind the true and only just measure in all such cases is actual damage. But, in order to hold the law under consideration in this case invalid, we would be compelled to overrule a number of former decisions of this court. This, a court of last

resort should never do except in extreme cases. I know of nothing more conducive to the well being of a state than a settled state of the law.

BARNES, *J.*, Dissenting:

I am unable to concur in the majority opinion. As I view the act in question it is unconstitutional for several reasons, but for the sake of brevity I shall discuss but one of them.

It clearly appears from the opinion of my associates that in order to uphold the statute they have been compelled to read into it certain exceptions to its operation and have intimated that the
154 court may, in a proper case, consider others. We have thus enlarged and changed the act by what seems to me to be judicial legislation to such an extent as to make a law which is quite different from the one passed by the legislature. It will be observed that by the plain language of the statute, common carriers in transporting live stock in carload lots over their lines in this state, must maintain a speed of eighteen miles per hour on their main and twelve miles per hour on their branch lines, and as a penalty for a failure to maintain that rate of speed they must pay to the shipper the sum of $10 per car per hour for each and every hour consumed beyond said time limit even if no damages are caused by the delay. To the operation of this law the statute itself contains no exceptions and permits of no excuses. One of the defendant's contentions is that the law is unconstitutional because it contains no exemption from liability even where the delay is caused by the act of God or the public enemy. I think however, this contention cannot be sustained for it may well be said that such an exception is always understood and will be supplied by implication. So far, I am in accord with my associates, but such a rule does not apply to the failure to operate trains on Sunday and delays caused by unavoidable accidents and the unlawful acts of third persons.

It is conceded, in effect, by the majority opinion that without the last-named exceptions the statute is unconstiiutional. It will be observed that as to the plaintiff's first cause of action, which
155 was for a delay which occurred on Sunday at the feed yards in Lincoln, the defendant is held not liable. It seems clear that as to this extent the opinion amends the law and this therefore amounts to judicial legislation. This should not be resorted to in order to uphold an act which, as it comes from the legislature, in effect deprives the carrier of his property without due process of law.

In re Contest Proceedings, 31 Neb., 262, it was said: "A casus omissus in a statute cannot be supplied by a court of law, for that would be to make laws." Where the words of a Statute are plainly expressive of an intent not rendered dubious by the context, the interpretation must carry out that intent. It matters not in such a case what the consequences may be. It has therefore been distinctly stated from early times down to the present day, that judges are not to mould the language of the statute in order to meet an alleged convenience, or an alleged equity; are not to be influenced by any

notions of hardship, or of what, in their view, is right and reasonable They are not to alter clear words though the legislature may not have contemplated the consequences of using them, and however unjust, arbitrary or inconvenient the intention may be, the statute must receive its full effect. What is called the policy of the government with reference to any particular legislation is too unstable a foundation for the construction of a statute. The clear language of a statute can be neither restrained nor extended by any consideration of supposed wisdom or policy and even when the court is
156 convinced that the legislature really meant and intended something not expressed by the phraseology of the act it will not deem itself authorized to depart from the plain meaning of the language which is free from ambiguity. It must be constructed according to its plain and obvious meaning, though the consequences should defeat the object of the act. A construction not supported by the language of the statute cannot be imposed by the court in order to effectuate what may be supposed to be the intention of the legislature. Endlich on Interpretation of Statutes, sections 4, 5 and 6.

When the words of the statute admit of but one meaning a court is not at liberty to speculate on the intention of the legislature, or to construe an act according to its own notions of what ought to have been enacted. The moment we depart from the plain words of the statute in a hunt for some intention founded on the general policy of the law, difficulties will meet us at every turn. Indeed, to depart from the language of the act is not to construe but to alter it and this amounts to judicial legislation.

Again, the power of construction is restrained by certain well-settled rules and if this were not so its use would often amount to usurpation of legislative power, and as was said in Gage v. Currie, 4 Pick. 402, "A violation of the constitution which we are sworn to support." In Hyatt v. Taylor, 42 N. Y. 258 it was held, that no rule of public policy, no necessity, no policy of right, no evidence
157 of intent derivable from the terms of the statute, or from its design, permits of a restriction of its plain and explicit language.

I am, therefore, of opinion that when, in order to prevent a law from being declared unconstitutional it is necessary to amend it by judicial construction, it is the duty of the court to promptly declare it unconstitutional and thus avoid usurping legislative powers.

For the foregoing reasons, among others, it seems clear to me that the law in question should be declared unconstitutional and the judgment of the district court should be reversed.

158 And afterwards, to-wit, on the 21st day of June, 1909, there was filed in the office of the Clerk of said Supreme Court a certain Remittitur, in the words and figures following, to-wit:

In the Supreme Court of the State of Nebraska.

WILBER I. CRAM, Appellee,
vs.
CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, Appellant.

Remittitur.

The appellee, Wilber I. Cram, in pursuance of the order of the court heretofore made herein, hereby remits the sum of $240.00 of the amount of the judgment rendered by the district court of Garfield county in this case, said remittitur to take effect as of the date of said judgment, and consents that said judgment shall be reduced the amount so as aforesaid remitted.

WILBER I. CRAM,
By E. J. CLEMENTS,
His Attorney.

Endorsed: 15148. In the Supreme Court of the State of Nebraska. Wilber I. Cram, Appellee, vs. Chicago, Burlington & Quincy Railway Company, Appellant. Remittitur. Supreme Court of Nebraska. Filed June 21, 1909. H. C. Lindsay, Clerk. E. J. Clements, Attorney for Appellee.

159 And afterwards, to-wit, on the 25th day of June, 1909, there was filed in the office of the Clerk of said Supreme Court a certain motion of appellant for rehearing, in the words and figures following, to-wit:

In the Supreme Court of the State of Nebraska.

#15148.

WILBUR I. CRAM, Appellee,
vs.
CHICAGO, BURLINGTON AND QUINCY RAILWAY COMPANY, Appellant.

Motion for Rehearing.

The appellant, Chicago, Burlington and Quincy Railway Company, moves the court to vacate and set aside the judgment of affirmance rendered herein June 11th, 1909, and to grant a rehearing in this case, and assigns in support hereof the following grounds:

1. The court erred in affirming the judgment of the District Court upon condition that appellee remit the sum of $240.00 on account of so much of said judgment as is based upon the first cause of action.

2. The court erred in holding that the pleadings did not admit the consideration of extra mileage in transporting one of the cars of live stock in controversy by way of Fort Crook.

3. The judgment of the District Court is not sustained either by the pleadings or evidence insofar as it rests upon any one of the twenty-five several causes of action set forth in the petition.

4. The petition of appellee does not state facts sufficient to constitute a cause of action, nor are the facts separately alleged in any one of the twenty-five causes of action sufficient to constitute a cause of action.

160 5. The court erred in adjudging the petition and evidence sufficient to sustain the judgment of the lower court based upon the several causes of action other than the first cause of action.

6. The pleadings of each one of the several causes of action set forth in the petition is fatally defective in substance in that it fails to set forth or allege that no part of the time from the departure of the shipment from Burwell to its arrival at South Omaha was consumed in picking up and setting out, loading or unloading live stock at stations, which time cannot, by the terms of the Act sued upon, be included in the time required under the schedules established thereby.

7. The court erred in holding that the evidence showing that some time was consumed at stations intermediate Burwell and South Omaha in setting out and picking up stock was not sufficiently tangible or definite to permit any deduction of time on account thereof. In so holding the court erroneously adjudged that plaintiff was prima facie entitled to a judgment upon the averments of his petition without any evidence to support the same and imposed on defendant the burden of proof to establish that it maintained the minimum schedule of time fixed by the statute.

8. The court erred in affirming the judgment of the District Court insofar as it is based on the twenty-first cause of action set forth in the petition. The shipment involved in said twenty-first cause of action was unloaded for feed at Lincoln and there lawfully and necessarily detained over Sunday and forwarded by the first train for delivery on the next ensuing Monday to South Omaha, and by the terms of the statute as construed in the opinion of the court in this case the rule applied in like circumstances to the first cause of action will preclude recovery for the delay entailed in shipment on account of feeding and stopping en route at Lincoln on Sunday. The
161 damages assessed on account of said twenty-first cause of action are excessive.

9. The court erred in determining to be valid chapter 107 laws of Nebraska 1905, sections 10606 and 10607 Cobbey's Annotated Statutes of 1907. The said statute is unreasonable, arbitrary and discriminatory and operates to deprive appellant of its property without due process of law to deprive appellant of the equal protection of the laws, in which respects it is violative of the provisions of article fourteen of amendments to the Constitution of the United States and, therefore, null and void.

10. The said statute is violative of sections eleven and fifteen of article three and of section five of article eight and of section four of article eleven of the Constitution of the State of Nebraska, and for that reason is null and void.

11. The court erred in holding that appellant in questioning the validity of the said statute as violative of the Constitutional provision that the liability of railroad corporations as common carriers should never be limited was attempting to litigate a shipper's rights in a hypothetical case. If the law on its face be violative of any provision of the State Constitution and for that reason void an adjudication to that effect would necessarily exonerate appellant from all liability in the present action; and in litigating the issue of liability this defendant has the same standing and right to invoke the provision of the Constitution as would a shipper claiming damages in excess of that provided by the statute.

JAMES E. KELBY,
HALLECK F. ROSE,
FRANK E. BISHOP,
Attorneys for Appellant.

Endorsed: 15148. Cram v. C., B. & Q. Ry. Co. Motion for rehearing. Supreme Court of Nebraska. Filed June 25, 1909. H. C. Lindsay, Clerk.

162 And afterwards, to-wit, on the 25th day of September, 1909, there was rendered upon the Journal thereof a certain order in the words and figures following, to-wit:

Supreme Court of Nebraska, September Term, A. D. 1909.

No. 15148.

WILBER I. CRAM, Appellee,
v.
CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, Appellant.

Appeal from the District Court of Garfield County.

SEPT. 25.

It is by the court ordered that oral argument be had herein on motion of appellant for rehearing upon the questions:

First. Does the petition state a cause of action?

Second. Does the statute violate section 4, article 11 of the Constitution, providing that the liability of railroad corporations shall never be limited?

M. B. REESE,
Chief Justice.

163 And afterwards, to-wit, on the 4th day of October, 1909, there was rendered by said Supreme Court and entered of record upon the Journal thereof a certain application, in the words and figures following, to-wit:

Supreme Court of Nebraska, September Term, A. D. 1909.

No. 15148.

WILBER I. CRAM, Appellee,
v.
CHICAGO, B. & Q. R. Co., Appellant.

Appeal from the District Court, Garfield County.

OCT. 4.

Upon application, it is by the court ordered that appellee be, and hereby is, given until November 4, 1909, to serve and file reply briefs herein; it is further ordered that cause be, and the same hereby is, continued to November 15, 1909.

M. B. REESE,
Chief Justice.

And afterwards, to-wit, on the 4th day of November, 1909, there was rendered by said Supreme Court and entered of record upon the Journal thereof a certain order in the words and figures following, to-wit:

164 Supreme Court of Nebraska, September Term, A. D. 1909.

No. 15148.

WILBER I. CRAM, Appellee,
v.
CHICAGO, B. & Q. R. Co., Appellant.

Appeal from the District Court of Garfield County.

NOV. 4.

Upon application, it is by the court ordered that appellee be, and hereby is, allowed until November 6, 1909 to serve and file reply briefs herein.

M. B. REESE,
Chief Justice.

And afterwards, to-wit, on the 19th day of November, 1909, the following among other proceedings were had and done in said Supreme Court, to-wit:

Supreme Court of Nebraska, September Term, A. D. 1909.

Nov. 19.

The following cause was argued by counsel and submitted to the Court:

No. 15148.

CRAM
v.
C., B. & Q. R. Co.

(On Motion for Rehearing) Appeal from Garfield County.

M. B. REESE,
Chief Justice.

165 And afterwards, to-wit, on the 14th day of December, 1909, there was rendered by said Supreme Court and entered of record upon the Journal thereof a certain Judgment, in the words and figures following, to-wit:

Supreme Court of Nebraska, September Term, A. D. 1909.

No. 15148.

WILBER I. CRAM, Appellee,
v.
CHICAGO, B. & Q. R. Co., Appellant.

Appeal from the District Court, Garfield County.

DEC. 14.

This cause coming on to be heard upon motion of appellant for a rehearing herein, was argued by counsel and submitted to the court; upon due consideration whereof, the court doth find probable error in the judgment of this court heretofore entered herein; it is therefore, considered, ordered and adjudged that said motion for rehearing be, and the same hereby is, sustained, and a rehearing herein allowed unless plaintiff remits within thirty days an additional $170.

M. B. REESE,
Chief Justice.

166 And on the 14th day of December, 1909, there was filed in the Office of the Clerk of said Supreme Court a certain Opinion by said Court, pursuant to which the preceding judgment was entered, which Opinion is in the words and figures following, to-wit.

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No. 15148.

CRAM
v.
CHICAGO, B. & Q. R. Co.

Opinion Filed December 14, 1909.

1. The petition examined, discussed in the opinion and held, to state a cause of action.

2. The first proviso clause in section 10606, Cobbey's Annotated Statute, 1907, construed, and held, the exceptions therein noted are matters of defense and need not be negatived by plaintiff.

3. A litigant who is not shown to have been prejudiced by the enforcement of an act of the legislature is not in position to assail such act on the ground of its being unconstitutional.

4. The legislature is presumed to know the general conditions surrounding the subject matter of legislative enactment, and it will be presumed it knows and contemplates the legal effect that accompanies the language it employs to make effective the legislative will.

168 DEAN, *J.*:

Our former opinion in this case affirming the judgment of the lower court is reported in 84 Neb., 607, 122 N. W., 31, to which reference is had for a statement of the facts. The delayed shipment act of the legislature of 1905, under which this suit was brought is assailed by defendant as being unconstitutional. The act upon which the attack is made also appears in our former opinion. A motion for rehearing supported by a brief in behalf of defendant has been filed, and also a reply brief by the plaintiff, and upon due consideration a reargument was ordered by the court which has been submitted by counsel upon the following points: "(1) Does the petition state a cause of action. (2) Does the statute violate Section 4, Article XI of the Constitution, providing that the liability of railway corporations shall never be limited."

The defendant argues that the burden is upon plaintiff to plead and prove every fact necessary to bring his case within the precise terms of the statute upon which his action is founded, and that the petition is fatally defective in each cause of action and is so deficient in substance that a judgment predicated thereon cannot be sustained. That part of section 10606, Cobbey's Annotated Statutes, 1907, that we are called upon to construe in order to determine the sufficiency of the petition, reads as follows: "Provided, in cases where the initial point is not a division station and on all branch lines not exceeding 125 miles in length, the rate of speed shall be such that not more than one hour shall be consumed in traversing each twelve miles of the distance including the time of stops at stations or other points, from the initial point to the first di-
169 vision station or over said branches. The time consumed in picking up and setting out, loading or unloading stock at

stations, shall not be included in the time required, as provided in this schedule."

Defendant now argues that plaintiff must, if he would avail himself of the benefit of the statute, plead and make proof of the time consumed in picking up and setting out, loading or unloading stock at intermediate stations between the point of shipment and the point of destination. The plaintiff contends that the time so consumed by the company in the movement of its trains is defensive matter and that the burden of proof is on the defendant. Plaintiff's several causes of action are each pleaded separately but in language substantially alike the only changes being those required to meet the necessary allegations as to the time and the amount of the respective shipments. Omitting the formal parts the following is plaintiff's 21st count in his petition, the language whereof defendant argues is so deficient in its allegations that it is insufficient to sustain the judgment: "That at all of the times hereinafter mentioned, the defendant was, and now is, a corporation duly organized and existing under and by virtue of the laws of the state of Iowa and did, and now does, own and operate a railroad between Burwell and South Omaha, in the state of Nebraska, as a public carrier of passengers and freight for hire in said state; that the defendant's said line of railroad runs through the city of Aurora in said state, and the portion of its said railroad extending between South Omaha and Aurora was, and is, a main line one hundred and twenty-five miles in length and the portion of its said railroad extending between Aurora and Burwell was, and is, a branch line one hundred and four miles in length."

170 "That, on the 8th day of September, 1905, the plaintiff delivered to the defendant, and it then received, at its railroad station in Burwell, Nebraska, one full car load of live stock, belonging to plaintiff, to be safely and securely conveyed by the defendant, over its said line of railroad, from Burwell to South Omaha, Nebraska, within the time provided for by statute, in consideration of the regular freight charges therefor which the plaintiff paid to the defendant; that the defendant's train conveying said car load of live stock, left Burwell, for South Omaha at 9 o'clock, A. M. of said day but did not arrive at South Omaha, the point of destination, until 4:55 o'clock A. M. on September 11, 1905, and the time consumed in said journey was fifty-two hours and eighteen minutes longer than permitted by the statutes of Nebraska, to the damage of the plaintiff in the sum of $520, as provided by statute."

We have carefully examined the petition, and the law applicable to the points involved, to discover if the objections raised by defendant are well taken, and we conclude the pleading is not defective in the particulars pointed out. In view of the authorities we are of the opinion defendant's contention cannot be sustained upon any reasonable theory of statutory construction. To do so would be to read a meaning into the statute which the law-making power evidently did not intend, and for which the legislative language, as used in the act, gives no warrant. The rule that seems to be applicable to the present case is concisely stated in 31 Cyc., 115: "Where a party relies upon a statute which contains an exception in the

enacting clause, such exception must be negatived; but where the exception occurs in a proviso or in a subsequent section of the
171 act, such exception is matter of defense and need not be negatived." This has long been the prevailing rule and it appears to have been almost universally followed.

In Chit. Pl., 16 Am. ed., 246, the author says: "In pleading upon statutes, where there is an exception in the enacting clause, the plaintiff must show that the defendant is not within the exemption, but if there be an exception in a subsequent clause, that is matter of defense, and the other party must show it to exempt himself from the penalty." On page 247 Chitty cites Lord Tenterden to the following effect: "If an act of parliament, or a private instrument contain in it, first, a general clause, and afterwards a separate and distinct clause, something which would otherwise be included in it, a party relying upon the general clause in pleading may set out that clause only, without noticing the separate and distinct clause which operates as an exception. But if the exception itself be incorporated in the general clause, then the party relying upon it must in pleading state it with the exception."

Lynch v. The People 16 Mich., 472, Cooley, C. J., speaking for the court says: "In pleading statutes where there is an exception in the enacting clause, the pleader must negative the exception; but when there is no exception in the enacting clause, but an exemption in a proviso to the enacting clause or in a subsequent section of the act, it is matter of defense, and must be shown by the defendant."

Bush v. Wathen, 47 S. W. (Ky.) 599: "When there is an exception in the enacting clause, the plaintiff must negative it. If the exception is in a subsequent clause to that giving the cause of
172 action, then, if it gives the defendant exemption from liability, he must plead it."

Toledo R. Co. v. Lavery, 71 Ill., 522: "Where a plaintiff relies upon a statute for a recovery, he need only to negative the exceptions in the enacting clause, and it is for the defendant to show, by way of defense, that the case falls within an exception in some other clause of the statute."

Harris v. White, 81 N. Y., 532: "Where an exception is contained in the enacting clause of a prohibitory statute, one who pleads the statute must negative the exception, and must prove the negative unless the subject matter of the negative and the means of proof are peculiarly within the knowledge and power of the opposite party, or where the negative does not admit of direct proof."

Muller v. The United States, Court of Claims, Vol. 4, p. 61: "When the enacting clause of a statute makes an exception to the general provisions of the act, a party pleading the provisions of the statute must negative the exception. But when the exception is contained in a proviso, and not in the enacting clause, the party pleading the statute need not negative the exception. It is for the other party to set it up in avoidance of the general provisions of the statute." To substantially the same effect are the following: Vandegrift v.

Meihle, 66 N. J. L., 92; 1 Bates Pl., 225; Fairbault v. Hulett, 10 Minn., 15; Bliss on Code Pleading, 3d ed., 202.

In support of its contention defendant cites Hale v. Missouri P. R. Co., 36 Neb., 266. We have examined that case and do not believe the conclusions there reached are applicable to the facts in the case at bar. The section of the United States statute referred to
173 therein differs materially from the statute under which the action in the case before us is brought. In the present case the exception relied upon is not in the enacting clause of the statute but occurs in a proviso, and it appears that the prevailing weight of authority is to the effect that where the exception is so stated in the statute, such exception is matter of defense and need not be negatived by the plaintiff. In Hale v. Missouri P. R. Co., 36 Neb., 266, it does not appear that the action was brought under the section of the United States statute that is referred to in that opinion. No reference is made to it in the record nor in the briefs of counsel. The statute is noticed for the first time in the record of the Hale case in the opinion of the court and appears to be dictum. The suit was brought evidently as a common law action on a contract of shipment for the loss of live stock by the alleged negligence of the railroad company, and appears to us to be clearly distinguishable from the one now before us. Young v. K. C. R. Co., 33 Mo. App., 509; Ruth v. Lowrey, 10 Neb., 260, and Haskins v. Olcott, 13 Ohio St., 216, cited by defendant, do not seem to be applicable to the facts involved herein.

In a case arising under the statute here in question it is obvious that the exceptions noted with respect to the time consumed in picking up and setting out cars and in loading and unloading stock at stations, are peculiarly within the knowledge of the employees of defendant, and doubtless the legislature had this thought in mind and the act was perhaps prepared in part to meet this condition. A shipper as such is not of necessity learned in the manifold intricacies attendant upon the active management of lines of transporta-
174 tion, and he would not perhaps be competent to determine with any reasonable degree of accuracy whether the time occupied by the railroad company, in the respects noted, was necessarily occupied or otherwise. In any event from the language of the statute as it appears in the act, it was evidently not the legislative intention to impose upon the shipper of live stock the burden of proving the exception noted in the statute before he could avail himself of its compensatory provisions. A shipper does not always accompany his stock to market particularly if the shipment consists of but a single carload lot in which event knowledge of the delay contemplated by the statute, and the reasons therefor, would be perhaps exclusively within the knowledge and the power of defendant. It may be that these and kindred contingencies engrossed the legislative mind when the remedial act in question was enacted. The legislature is presumed to know the general condition surrounding the subject matter of legislative enactment, and it will be presumed it knows and contemplates the legal effect that accompanies the language it employs to make effective the legislative will. The presumption will

also be indulged that the law-making body is conversant with the established rules of statutory construction and that in the passage of the act in question it did not lose sight of the elementary proposition that the enacting clause of a statute is that part which immediately precedes the proviso. After careful consideration we hold upon this point that the contention of defendant cannot be upheld and that the exception noted in the statute is matter of defense that need not be negatived by plaintiff. Upon the second point to which the argument of counsel is directed defendant contends that the act in question contravenes section 4, art. XI of the constitution, which
175 provides that the liability of railroad corporations as common carriers shall never be limited, and should therefore be declared void. Following is the provision of the constitution which the defendant maintains has been violated by the act under which this suit is brought and to which the argument on re-hearing has in part been directed. Con. sec. 4 art. XI: "Railways heretofore constructed, or that may hereafter be constructed in this state are hereby declared public highways, and shall be free to all persons for the transportation of their persons and property thereon, under such regulations as may be prescribed by law. And the legislature may from time to time pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on the different railroads in this state. The liability of railroad corporations as common carriers shall never be limited." To the argument of defendant on this point plaintiff interposes the objection that the defendant company cannot be heard to urge the alleged unconstitutionality of the act because it is not shown that it has been in any manner injured thereby. In this respect the record sustains the position of plaintiff. There is not a syllable of testimony to show that the amount of plaintiff's recovery under the statute is less than the actual damage he suffered by the delay of his shipments and for which, even in the absence of a statute, the defendant would be liable. Until defendant is shown affirmatively to have been injured he cannot be heard to complain that the act under which the suit is brought is unconstitutional. The rule is thus stated in Cooley's Constitutional Limitations, 7th ed., 232: "Nor will a court listen to an objection made to the constitutionality of an act by a
176 party whose rights it does not affect, and who has therefore no interest in defeating it." In Clark v. Kansas City, 176 U. S. Rep., 114, Mr. Justice McKenna cites with approval the foregoing language of Judge Colley and adds: "We concur in this view, and it would be difficult to add anything to its expression."

Kellogg v. Currens, 111 Wis., 431: "Statutes are not to be declared unconstitutional at the suit of one who is not a sufferer from their unconstitutional provisions. * * * We cannot set aside the acts of the legislature at the suit of one who, suffering no wrong himself, merely assumes to champion the wrongs of others."

In Wellington et al., Petitioners, 16 Pickering's Rep., 87, the court speaking by Shaw, C. J., says: "Where an act of the legislature is alleged to be void, on the ground that it exceeds the limits of legislative power and thus injuriously affects private rights, it is to be

deemed void only in respect to those particulars and as against those persons, whose rights are thus affected."

The following authorities fairly support plaintiff's contention: People v. Brooklyn R. Co., 89 N. Y. Rep., 75; Williamson v. Carleton, 51 Me., 499; Pittsburg R. Co. v. Montgomery, 152 Ind. 1; Currier v. Elliott, 141 Ind., 395; Board of Commissioners v. Reeves, 148 Ind., 467; 6 A. & E. Encyc. of Law, 2d ed., 1090; Commonwealth v. Wright, 79 Ky. 22; Sullivan v. Berry, 83 Ky., 198; Jones v. Black, 48 Ala., 540; 32 La. Ann., Rep., 726; McKinney v. State, 3 Wyo., 721; Dejarnett v. Haynes, 23 Miss., 600; Marshall v. Donovan, 10 Ky., 681; Small v. Hodgen, 1 Littell's Rep. (Ky.) 16; Henderson v. State, 137 Ind., 552; Embury v. Conner, 3 N. Y. Rep. 511; Supervisors v. Stanley, 105 U. S. Rep., 305.

177 In support of its position defendant cites Greene v. State, — Neb., —, 119 N. W. 6. We have carefully examined the citation and it seems to us to be clearly distinguishable from the case now before us. The validity of a criminal statute was there in question that by its express terms limited its protective features exclusively to citizens or residents of this state. The act was held to be invalid because it contravened section 15, art. III of the Nebraska constitution which prohibits special legislation, and section 1 of the fourteenth amendment to the federal constitution which provides that no state shall deny any person within its jurisdiction the equal protection of the laws. From an examination of that case it is obvious if the defendant there could not invoke the protection of the constitutional inhibitions no one could do so.

After careful examination and in view of the foregoing authorities, and for the reasons stated in the opinion, we find ourselves precluded from passing upon the constitutional points raised and argued by the defendant.

A minor feature remains for us to consider. In its brief for rehearing defendant maintains it is entitled to a remittitur of $170 from the amount allowed to plaintiff on his 21st cause of action, and in support of its contention invokes the rule applied by us in our former opinion to plaintiff's first cause of action wherein we deducted $240 from the amount allowed by the trial court.

Plaintiff sued under the act in question for 25 separate delayed shipments and recovered judgment as damages therefor in the total sum of $1,640. In reviewing the judgment of the lower court in our former opinion we directed, for the reasons therein stated and

178 which need not be here repeated, that unless the plaintiff within thirty days of the filing of the opinion, remitted $240 as of the date the judgment was entered in the lower court, the case would be reversed and the cause remanded for further proceedings because of an excessive allowance for damages growing out of plaintiff's first cause of action, but that if such remittitur were filed the judgment of the district court would be affirmed. A remittitur was duly filed in the manner and within the time pointed out in the opinion. The record discloses without contradiction the 21st cause of action relates to a shipment made at Burwell on Friday, September 8, 1905, at 9 o'clock in the forenoon, which arrived in South Omaha, the

point of destination, on the following Monday, September 11, at 4:55 o'clock in the morning. Plaintiff alleges this shipment was fifty-two hours and eighteen minutes longer in transit than the time contemplated by the statute in question, and that the amount of the recovery to which he is entitled therefor under the statute as liquidated damages is $520. The answer alleges and the proofs show that this cattle shipment arrived at Lincoln on its way to South Omaha, at 9:20 in the forenoon on the Sunday following the date of shipment and was held there until 11:40 in the afternoon of the same day, in the meantime having been unloaded and fed, when it was again loaded and reshipped to the point of destination, arriving there on Monday at 4:55 in the morning. The proofs show the cattle were in the pens and feed yards of the defendant fourteen hours and twenty minutes at Lincoln, thus entitling defendant, by the terms of the act in question, to have deducted from the time allowed to plaintiff in the trial court the fourteen hours and twenty
179 minutes that the cattle were in the Lincoln feed yards. To this must be added an additional deduction of two hours and forty minutes in favor of defendant, that being the difference in the time alleged in the petition and the time as actually shown by the record, in addition to the time consumed in feeding at Lincoln, which should be deducted from the delayed time for which plaintiff was allowed damages in the trial court, making a total deduction of seventeen hours, and which, under the statute, amounts to $170, and for which amount defendant is entitled to an additional remittitur.

Upon careful re-examination of the questions argued upon the rehearing we adhere to our former opinion, except to hold that defendant is entitled to an additional remittitur of $170 for the reasons stated herein, and unless within 30 days after the filing of this opinion plaintiff remits that amount from the judgment obtained in the trial court the case will be reversed and remanded for further proceedings, but in the event of the filing of such remittitur within the time named the motion for rehearing will be overruled and our former opinion sustained.

ROSE, *J.*, did not sit and took no part in this decision.

BARNES, *J.* (dissenting):

I am constrained to dissent from the conclusion of my associates. The majority hold that the petition in this case is sufficient without an allegation that no part of the time employed by the carrier in transporting plaintiff's stock, in so far as delay is made the basis of recovery, was "Consumed in picking up and setting out, load-
180 ing and unloading stock at stations". I am unable to concur in this holding. For anything appearing in the petition the delay, for which the plaintiff recovered at the rate of $10 an hour for each car, may have been caused by the performance of the carrier's lawful and imperative duty to pick up and set out cars of stock. The time thus employed by the carrier cannot be made a basis of recovery, because the statute says: "The time consumed in picking up and setting out, loading or unloading stock at stations shall not be included

in the time required as provided in this schedule." It seems to me to be a strange rule of pleading which denies a carrier the benefit of this positive command, unless it is pleaded as a defense. The statute forbids a recovery for the time consumed by the carrier in the performance of the unavoidable duty of picking up and setting out cars at stations. In allowing shippers of live stock to recover for delays without regard to actual damages, the legislature attempted to create an arbitrary remedy which is a stranger to the common law, and which has few, if any, parallels in remedial legislation. I do not believe that the right of recovery should be extended by judicial construction of the statute. One invoking its provisions should be required to bring his case exactly within its terms, and show by affirmative allegations that the conditions making recovery unlawful do not exist. The courts are not responsible for hardships in making proof of facts essential to such statutory relief, and have no right to impose on a defendant the burden of proving non-existent conditions simply because the information is within its knowledge, where the legislature by unambiguous language has pointed out a different course.

181 One reason given for the conclusion of the majority is that the conditions or exceptions are found in a proviso, and hence should be pleaded by the defendant, when relied on as a defense. I think a careful reading of the statute will show the fallacy of this reasoning. The material part of the enactment is as follows: "It is hereby declared and made the duty of each corporation, individual or association of individuals, operating any railroad as a public carrier of freight in the state of Nebraska, in transporting live stock from one point to another in said state in carload lots, in consideration of the freight charges paid therefor, to run their train conveying the same at a rate of speed so that the time consumed in said journey from the initial point of receiving said stock to the point of feeding or destination, shall not exceed one hour for each eighteen miles travelled, including the time of stops at stations or other points, provided, in cases where the initial point is not a division station, and on all branch lines not exceeding 125 miles in length, the rate of speed shall be such that not more than one hour shall be consumed in traversing each 12 miles of the distance, including the time of stops at stations or other points, from the initial point to the first division station or over said branches. The time consumed in picking up and setting out, loading or unloading stock at stations, shall not be included in the time required, as provided in this schedule." Cobbey's Annotated Statutes, sec. 10606.

It will be observed that the language following the word "Provided" down to the concluding word of that clause, fixes the minimum rate of speed on all branch lines not exceeding 125 miles in length, and the preceding portion fixes the minimum rate of

182 speed on all other lines. It follows that the proviso, if it may be so called, applies alone to the rate of speed on branch lines, and has no application whatever to that portion of the substantive and declaratory part of the act which applies to both main line and branches, and which reads: "The time consumed in pick-

ing up and setting out, loading or unloading stock at stations shall not be included in the time required, as provided in this schedule." When a carrier is sued for delay in transporting stock on a branch line only, where the minimum rate of speed is 12 miles an hour, is the plaintiff's measure of recovery determined by the main line speed of 18 miles an hour unless the defendant pleads that the stock was shipped over a branch line? If this question cannot be answered in the affirmative, then the correct rule has not been announced by the majority. The provision fixing a 12-mile rate of speed on branch lines is found alone in the so-called proviso, and precedes the clause relating to time consumed in picking up and setting out stock at stations, which declares "The time consumed in picking up and setting out, loading or unloading stock at stations, shall not be included in the time as provided in this schedule." This clause is a substantive part of the declaratory provisions of the act, and applies to the schedule of both main and branch lines. The fact that the word "proviso" precedes the exception relating alone to the rate of speed on branch lines, does not alter the situation or change the import of the legislation. If this be a correct conception of the statute then the plaintiff's case is within the rule announced by this court in Ruby v. Lowrey, 10 Neb., 262, which reads as follows: "It is an elementary principle in pleading that where a statute upon certain conditions confers a right or gives a remedy
183 unknown to the common law, the party asserting the right or availing himself of the remedy must, in his pleading, bring himself or his cause clearly within the statute. Haskins v. Alcott, 13 O. St., 216."

It seems clear to me that in allowing the plaintiff to recover without pleading that no part of the whole time employed by the carrier in transporting the plaintiff's stock "was consumed in picking up and setting out, loading or unloading stock at stations, the majority has departed from the principle announced in Hale v. Missouri. P. R. Co., 36 Neb., 266, 54 N. W. 517.

Again, the majority of the court has declined to pass upon the question of the constitutionality of the act on which the plaintiff's right to recover depends, for the alleged reason that the defendant is not injured thereby. I am unable to understand the logic of this declaration. Solely by reason of the provisions of the statute in question, and without other cause, the decision of the majority requires the defendant to pay to the plaintiff a sum of money amounting to about $1500 as socalled liquidated damages, although plaintiff has not shown that he has suffered any actual damages whatever by any act of the defendant, negligent or otherwise. The effect of this decision is to take from the defendant that much of its property and transfer it to the pocket of the plaintiff without any legal or equitable right, other than the command of the statute complained of.

To say that the defendant is not injured by the enforcement of the act, and therefore cannot question its constitutionality, seems absurd. Such a declaration should not find sanction in any judgment of this court.

184 For the foregoing reasons I am of opinion that a rehearing should be allowed; that our former decision should be overruled and the judgment of the district court should be reversed.

FAWCETT, *J.*, concurs.

185 And afterwards, to-wit, on the 15th day of December, 1909, there was filed in the office of the Clerk of the Supreme Court a certain Remittitur, in the words and figures following, to-wit:

In the Supreme Court of the State of Nebraska.

WILBER I. CRAM, Appellee,
v.
CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, Appellant.

Remittitur.

The appellee, Wilber I. Cram, in pursuance of the order of the court heretofore made herein on the 14th day of December, 1909, hereby remits the sum of $170.00 of the amount of the judgment rendered by the district court of Garfield County in this case, said remittitur to take effect as of the date of said judgment and consents that said judgment shall be reduced by the amount so as aforesaid remitted.

Dated this 15th day of December, 1909.

WILBER I. CRAM,
By E. J. CLEMENTS,
His Attorney.

Endorsed: 15148. Cram v. C., B. & Q. R. Co. Remittitur. Supreme Court of Nebraska. Filed Dec. 15, 1909. H. C. Lindsay, Clerk.

186 And afterwards, to-wit, on the 20th day of December, 1909, there was rendered by said supreme court and entered of record upon the Journal thereof a certain order in the words and figures following, to-wit:

Supreme Court of Nebraska, September Term, A. D. 1909.

No. 15148.

WILBER I. CRAM, Appellee,
v.
CHICAGO, B. & Q. R. Co., Appellant.

Appeal from the District Court of Garfield County.

DEC. 20.

It appearing to the court that the remittiturs heretofore ordered by the court have been duly filed by appellee, it is hereby ordered that

the motion of appellant for a rehearing heretofore filed herein be, and the same hereby is, overruled, and the judgment of the district court affirmed.

M. B. REESE,
Chief Justice.

And afterwards, to-wit, on the 22nd day of December, 1909, there was filed in the office of the Clerk of said Supreme Court a certain motion of appellant to withhold mandate, in the words and figures following, to-wit:

187 In the Supreme Court of the State of Nebraska.

WILBER I. CRAM, Appellee,
v.
CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, Appellant.

Motion to Withhold Mandate.

Chicago, Burlington and Quincy Railway Company, appellant herein, moves the court for an order withholding for twenty days mandate on the judgment of affirmance rendered herein on the 20th day of December, 1909, overruling the motion for rehearing upon appellee filing a remittitur, and assigns in support thereof the following reasons:

1. There is in issue in said cause the validity of a statute of the State of Nebraska, upon the ground that the said statute was and is repugnant to the Constitution of the United States, and the decision of this court was in favor of the validity of said statute. The said question is subject to review upon writ of error in the Supreme Court of the United States, and it is the intention and purpose of appellant to apply herein for a writ of error from the Supreme Court of the United States for the review of said judgment and to supersede the same in event said writ is allowed until final judgment is rendered upon said writ in the Supreme Court of the United States.

2. The preparation of the formal pleadings, including petition for said writ of error, the assignments in error, and supersedeas bond, and the preparation of the record, will require a period of approximately twenty days and will necessitate a re-examination of the record in said cause in order to appropriately present issues of law for review in the Supreme Court of the United States.

188 3. The issuance of a mandate and the execution, or attempted execution, of the judgment rendered herein pending the said review and the proceedings necessary to perfect the same, will entail in this cause needless costs and operate oppressively upon the appellant.

HALLECK F. ROSE,
Attorneys for Appellant.

STATE OF NEBRASKA,
County of Douglas, ss:

Halleck F. Rose, being first duly sworn, upon his oath says: I am one of the attorneys for the appellant in the above entitled cause. It is the intention of appellant, and of appellant's attorneys, to apply in said cause for a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Nebraska to review the judgment entered herein, upon the ground that in said proceedings, there was drawn in question the validity of a statute of the State of Nebraska, on the ground that said statute was and is repugnant to the Constitution of the United States, and that the decision of this court was in favor of the validity of said statute. To prepare the pleadings necessary to obtain said writ of error will necessitate a re-examination of the record in said cause by appellant's attorneys, in order to properly formulate assignments in error for the review of said judgment.

On the day following the entry of said judgment, the appellant requested the record in said cause to be forwarded by the Clerk of this Court to its attorneys, who reside in the City of Omaha, Nebraska, and sufficient time has not yet elapsed to enable counsel to receive said record or to prepare the pleadings necessary and
189 requisite to the obtaining of said writ of error.

At the same time, the appellant has in contemplation an application for leave to present a further and second motion for rehearing, the preparation of which will also require an examination of the said record, and will require, under the rules of this court, to be supported by a printed brief, and that a reasonable and necessary period of time to prepare the pleadings and briefs aforesaid is twenty days.

And further affiant saith not.

HALLECK F. ROSE.

Subscribed in my presence and sworn to before me this 21st day of December, A. D. 1909.

[SEAL.] C. H. MARLEY,
Notary Public.

Ecdorsed: 15148, Wilber I. Cram, Appellee, v. Chicago, Burlington and Quincy Railway Company Appellant. Motion to withhold mandate Supreme Court of Nebraska, Filed Dec. 22, 1909. H. C. Lindsay, Clerk.

190 And afterwards, to-wit, on the 22nd day of December, 1909, there was rendered by said Supreme Court and entered upon the Journal thereof a certain order, in the words and figures following, to-wit:

Supreme Court of Nebraska, September Term, A. D. 1909.

No. 15148.

WILBER I. CRAM, Appellee,
v.
CHICAGO, B. & Q. R. Co., Appellant.

Appeal from the District Court of Garfield County.

DEC. 22.

This cause coming on to be heard upon motion of appellant for an order to withhold the mandate for twenty days, was submitted to the court; upon due consideration whereof, it is by the court ordered that said motion be, and the same hereby is, sustained, and the clerk directed to withhold the issuances of mandate herein for twenty days from this date.

M. B. REESE,
Chief Justice.

191 And afterwards, to-wit, on the 25th day of March, 1910, there was rendered by said Supreme Court and entered of record upon the Journal thereof a certain order pertaining to second motion for rehearing commencing April 18, 1910, in the words and figures following, to-wit:

Supreme Court of Nebraska, January Term, A. D. 1910.

No. 15148.

WILBER I. CRAM, Appellee,
v.
CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, Appellant.

Appeal from the District Court of Garfield County.

MARCH 25.

Upon application it is by the court erdered that defendant herein, be and hereby is, granted leave to file a second motion for rehearing herein, and that the said motion be orally argued at the session of court commencing April 18, 1910.

M. B. REESE,
Chief Justice.

And on the same day there was filed in the office of the Clerk of said Supreme Court a certain motion for rehearing, in the words and figures following, to-wit:

192 In the Supreme Court of the State of Nebraska.

No. 15148.

WILBER I. CRAM, Appellee,
vs.
CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, Appellant.

Motion for a Second Rehearing.

The appellant, Chicago, Burlington and Quincy Railway Company, be leave of court first granted, moves the court for a second and further rehearing of this case, and to vacate and set aside the judgments and orders made herein of date December 14th 1909, affirming the judgment of the District Court, on condition that appellee remit the further sum of $170.00 and of date December 20th, 1909, making said conditional order absolute, and in support hereof appellant says the court erred in its proceedings and judgment herein in the particulars following:

1. The court erred in adhering to its former judgment rendered June 11th, 1909.

2. The court erred in affirming the judgment of the district court upon condition that appellee remit the further sum of $170.00 and in making said judgment of affirmance absolute upon the filing of such remittitur.

3. The court erred in holding that chapter 107, laws of Nebraska, 1905, Cobbey's Annotated Statutes, sections 10606 and 10607, is a valid legislative enactment. Said statute is void for the following reasons:

193 (*a*) It is violative of section 4 of article 11 of the Constitution of Nebraska, providing that the liability of railroads as common carriers shall never be limited.

(*b*) It is violative of section 5 of article 8 of the Constitution of Nebraska, providing that all penalties shall be appropriated exclusively to the use and support of the common schools.

(*c*) It is violative of article 2 of the Constitution of Nebraska, distributing the powers of government, and providing that no person or collection of persons being one of the departments of government, shall exercise any power properly belonging to either of the others.

(*d*) It is violative of section 1 of article 6 of the Constitution of Nebraska, conferring all the judicial power of the State upon the Courts of Justice.

(*e*) It is violative of section 3 of article 1 of the Constitution of Nebraska, providing that no person shall be deprived of life, liberty or property without due process of law.

(*f*) It is violative of section 11 of article 3 of the Constitution of Nebraska, providing that no law shall be amended unless the new act shall contain the section or sections so amended and the section or sections so amended shall be repealed.

(*g*) It is violative of section 15 of article 3 of the Constitution of

Nebraska prohibiting special legislation, in that it regulates the practice of courts of justice in respect to assessment of damages in a special class of cases only, and its provisions are special where a general law could be made applicable.

194 (½) It is violative of article 14 of Amendments to the Constitution of the United States, in that it is unreasonable, arbitrary, and discriminatory, and operates to deprive appellant of its property without due process of law, and to deprive appellant of the equal protection of the laws.

4. The court erred in holding that appellant is not prejudiced by enforcement, in this case, of the provisions of chapter 107 of the laws of Nebraska, 1905, and that appellant is without standing as a suitor in this case to question the constitutional validity of said act.

5. The court erred in refusing and declining to entertain, consider and determine the issue of law that chapter 107 of the laws of Nebraska, 1905, is violative of section 4 of article 11 of the Constitution providing that the liability of railroads as common carriers shall never be limited.

6. The court erred in holding that the petition of appellee states facts sufficient to constitute a cause of action in all or any one of the causes of action therein.

7. The court erred in holding that the appellee in stating a cause of action for damages under the provisions of chapter 107 of the laws of Nebraska, 1905, may disregard the provision in section 1 thereof that "The time consumed in picking up and setting out, loading and unloading stock at stations, shall not be included in the time required, as provided in this schedule," and in holding that in order to state a cause of action under the statute it was not essential to allege that no part of the period of delay alleged as the basis of recovery of damages was consumed in picking up and setting out, loading and unloading stock at stations. In this behalf the ruling and judgment are in irreconcilable conflict with the plain and unambiguous terms of the statute.

195 3. The court erred in holding that it is within the power of the legislative branch of the government *of* determine and liquidate the measure of damages and fix the compensation to be awarded by the courts of justice in favor of a shipper against a railroad company for each hour of delay in transporting live stock. The legislative attempt to do so is a usurpation of power which the constitution delegates exclusively to the courts.

9. The court erred in holding that the quantum or measure of damages caused by delay in transporting stock is attended with any special or peculiar difficulty of proof, and because thereof is a legitimate subject of political or legislative policy to be liquidated by legislative enactment with like effect as if done by contract of the parties. Appellant says the law is, to the contrary, that the actual damages in such cases are of ready and convenient proof and definite and certain in amount; and the common law rule of actual compensation, adopted by the people and embodied in section 4 of article 11 of the State Constitution, is the exclusive rule of liability

of railroads in such cases and is binding and obligatory upon the legislature, the courts and the contracting parties.

10. The act in question, in all cases where the damages prescribed exceed the loss sustained, operates as a rebate and preference in favor of the shipper of live stock and is repugnant to other valid statutes forbidding the payment of rebates and the granting of preferences; in all cases where the damages prescribed are less than the loss sustained the act operates to limit the liability of railroads as common carriers and to abolish the common law rule of actual compensation, and is repugnant to said section 4 of article 11 of
196 the Constitution of Nebraska; and however construed is contrary to the public policy of the state, as declared in the constitution and in numerous valid statutes enacted pursuant thereto, and not referred to nor repealed by the act in question.

JAMES E. KELBY,
HALLECK F. ROSE,
Attorneys for Appellant.

And afterwards, to-wit, on the 20th day of April, 1910, the following among other proceedings were had and done in said Supreme Court, to-wit:

Supreme Court of Nebraska, January Term, A. D. 1910.

APRIL 19.

The following causes were argued by counsel and submitted to the court:

* * * * * * *

No. 15148. Cram v. C., B. & Q. R. Co., (On motion for rehearing). Appeal from Garfield County.

M. B. REESE,
Chief Justice.

197 And afterwards, to-wit, on the 23rd day of November, 1910, there was rendered by said Supreme Court and entered of record upon the Journal thereof a certain Judgment, in the words and figures following, to-wit:

Supreme Court of Nebraska, September Term, A. D., 1910.

No. 15148.

WILBER I. CRAM, Appellee,
v.
CHICAGO, B. & Q. R. Co., Appellant.

Appeal from the District Court, Garfield County.

Nov. 23.

This cause coming on to be heard upon second motion of appellant for a rehearing herein, heretofore filed herein by leave of court,

was argued by counsel and submitted to the court; upon due consideration whereof, the court doth find no probable error in the judgment of this court heretofore entered herein; it is, therefore, considered, ordered and adjudged that said motion for rehearing be, and the same hereby is, overruled, and a rehearing herein denied.

M. B. REESE,
Chief Justice.

And afterwards, to-wit, on the 25th day of November, 1910, there was filed in the office of the Clerk of said Supreme Court a certain Motion of Appellee for Mandate, in the words and figures following, to-wit:

198 In the Supreme Court of the State of Nebraska.

WILBER I. CRAM, Appellee,
vs.
CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, Appellant.

Precipe.

To the Clerk of said Court:

You are hereby requested to issue mandate in the above entitled case.

WILBER I. CRAM,
By E. J. CLEMENTS,
His Attorney.

Endorsed: 15148. Cram v. C. B. & Q. Motion of appellee for mandate. Supreme Court of Nebraska. Filed Nov. 25, 1910. H. C. Lindsay, Clerk.

199 And afterwards, to-wit, on the 3rd day of December, 1910, there was filed in the office of the Clerk of said Supreme Court a certain Petition for Writ of Error to U. S. Supreme Court, which said original petition for writ of error is hereto attached and is in the words and figures following, to-wit:

200 In the Supreme Court of the State of Nebraska.

No. 15148.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, Plaintiff in Error,
vs.
WILBUR I. CRAM, Defendant in Error.

Petition for Writ of Error.

To the Honorable the Chief Justice of the Supreme Court of the State of Nebraska:

The above named plaintiff in error complains that in the judgment, decision, record and proceedings in a certain cause pending

in the Supreme Court of the State of Nebraska, in which the above named plaintiff in error was appellant and Wilbur I. Cram was appellee, which cause was decided and determined by the said Supreme Court of the State of Nebraska and judgment of affirmance therein rendered on December 14th, 1909, and in which a motion for a rehearing in said Court was thereafter filed by leave of court obtained, and overruled on the 23rd day of November, 1910, at which time the said judgment of said court became final, which said Supreme Court of the State of Nebraska was the highest court of law or equity in which a decision or judgment could be had in said action, and in which action and the judgment and decision therein there was drawn in question the validity of a statute or an authority exercised under the State of Nebraska, on the ground of its being repugnant to the constitution, treaties or laws of the United States, and the decision therein was in favor of its validity.

201 manifest error happened as appears from said judgment and decision and the record and in the assignment of errors herewith presented, to the great damage of the plaintiff in error.

Wherefore, the said plaintiff in error prays the allowance of a writ of error to the Supreme Court of the State of Nebraska for the removal of said record, judgment and proceedings in said action into the Supreme Court of the United States for its revision and correction thereof and for citation and supersedeas thereon, and your petitoner will ever pray.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY.
By JAMES E. KELBY,
HALLECK F. ROSE, *Its Attorneys.*

202 [Endorsed:] No. 15,148. In the Supreme Court of the State of Nebraska. C., B. & Q. R. R. Co., Plaintiff in Error, vs. Wilbur I. Cram, Defendant in Error. Petition for Writ of Error. Supreme Court of Nebraska. Filed Dec. 3, 1910. H. C. Lindsay, Clerk.

203 And on the same day there was filed in the office of the Clerk of said Supreme Court a certain Assignments of Error, which said original assignments of error are hereto attached and are in the words and figures following, to-wit:

204 In the Supreme Court of the State of Nebraska.

No. 15148.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, Plaintiff in Error,
vs.
WILBUR I. CRAM, Defendant in Error.

Assignments of Error.

Now comes the plaintiff in error, Chicago, Burlington & Quincy Railroad Company, and respectfully submits that in the record, pro-

ceedings, decision and final judgment of the Supreme Court of the State of Nebraska in the above entitled cause, there is manifest error in this, to wit:

Assignment of Errors.

1. The said Supreme Court of the State of Nebraska erred in affirming the judgment of the District Court of Nebraska within and for Garfield County.

2. The said Supreme Court of the State of Nebraska erred in holding that the petition of plaintiff stated facts sufficient to constitute a cause of action or to sustain the judgment rendered in said District Court.

3. The said Supreme Court of the State of Nebraska erred in holding and deciding that the act of the legislature of the State of Nebraska, entitled "An Act to Regulate the Carrying of Livestock by Railroads in the State of Nebraska, to Fix a Minimum Rate of Speed, and to Provide Damages for the Violation of this Act," approved March 30th, 1905, and being chapter 107, Laws of Nebraska of 1905, pages 506 and 507; Compiled Statutes of Nebraska, Chapter 72, Article 1, Sections 10 and 11; Cobbey's Annotated Statutes of Nebraska, Sections 10,606 and 10,607, is a valid enactment
205 and not violative of nor repugnant to article 14 of amendments to the constitution of the United States. The said legislative act is in its terms unreasonable, unequal, arbitrary and discriminatory and operates to deprive plaintiff in error of its property without due process of law, and to deprive appellant of the equal protection of the laws, and in each and every one of said particulars is violative of and repugnant to the provisions of the 14th amendment to the constitution of the United States, providing that "no state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

4. The said Supreme Court of the State of Nebraska erred in holding, deciding and adjudging to be valid and not violative of Article 14 of Amendments to the Constitution of the United States, Section 2 of said Chapter 107 of the Laws of Nebraska of 1905, in the words following: "Section 2. Any individual, corporation or association of individuals violating any provisions of this act, shall pay to the owner of such live stock the sum of Ten Dollars for each hour for each car it extends or prolongs the time of transportation beyond the period herein limited, as liquidated damages, to be recovered in an ordinary action as other debts are recovered."

5. The said Supreme Court of the State of Nebraska erred in holding, deciding and adjudging to be valid and conclusive a legislative determination of the quantum or measure of damages flowing from the breach of a private contract for shipment of live stock in carload lots by railroad, and of the quantum or measure of damages sustained by a private person for the failure to transport such

live stock at a prescribed minimum rate of speed, when such legislative act and determination of damages was wholly distinct and apart from the exercise of police power and not a punitive
206 measure to enforce compliance with the commands of the statute. The provisions of said Chapter 107 of the Laws of Nebraska of 1905, which by the said judgment was held and determined to be valid as a legislative determination of the quantum or measure of damages assessed in favor of defendant in error against plaintiff in error, was a usurpation of functions which are exclusively judicial, contrary to the law of the land and violative of and repugnant to the provisions of the 14th amendment of the Constitution of the United States, prohibiting any state from depriving any person of life, liberty or property without due process of law, and is therefore void and of no effect.

Wherefore, the plaintiff in error prays that the judgment of the said Supreme Court of the State of Nebraska be reversed and judgment be rendered herein in favor of said plaintiff in error and for costs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,
Plaintiff in Error.

By JAMES E. KELBY,
HALLECK F. ROSE, *Its Attorneys.*

207 [Endorsed:] No. 15,148. In the Supreme Court of the State of Nebraska. C., B. & Q. R. R. Co. vs. Wilbur I. Cram. Assignment of Error. Supreme Court of Nebraska. Filed Dec. 3, 1910. H. C. Lindsay, Clerk.

208 And on the same day there was rendered by said Supreme Court and entered of record upon the Journal thereof a certain order allowing a writ of error, in the words and figures following, to-wit:

Supreme Court of Nebraska, September Term, A. D. 1910.

No. 15148.

WILBER I. CRAM, Appellee,
v.
CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, Appellant.

Appeal from the District Court, Garfield County.

DEC. 3.

This cause coming on to be heard upon the assignments of error and petition for a writ of error to the Supreme Court of the United States by the Chicago, Burlington & Quincy Railway Company, appellant herein; upon due consideration whereof, it is ordered that a writ of error removing the record and proceedings in said suit to the Supreme Court of the United States be allowed and that a citation be directed to Wilber I. Cram, appellee herein, and defendant in error, for his due appearance in said Supreme Court of the United States.

M. B. REESE,
Chief Justice.

209 And on the same day there was filed in the office of the Clerk of said Supreme Court a certain Writ of Error, which said original Writ of Error is hereto attached and is in the words and figures following, to-wit:

210 The President of the United States to the Honorable the Judges of the Supreme Court of the State of Nebraska, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a certain plea which is in the said Supreme Court of the State of Nebraska, before you or some of you, being the highest court of law or equity of said state in which a decision could be had in the said suit between the Chicago, Burlington & Quincy Railroad Company, defendant and plaintiff in error, and Wilbur I. Cram, plaintiff and defendant in error, wherein was drawn in question the validity of a statute of said state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of such their validity, a manifest error hath happened to the great damage of the said Chicago, Burlington & Quincy Railroad Company, plaintiff in error, as by its complaint appears.

We, being willing that error, if any hath happened, should be duly corrected and full and speedy justice done to the party aforesaid, in this behalf do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the 2nd day of January next, in the said Supreme Court, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and ac-
211 cording to the laws and customs of the United States should be done.

Witness the Honorable John M. Harlan, Associate Justice of the Supreme Court of the United States, the 3rd day of December, 1910.

[Seal United States Circuit Court, District of Nebraska, Lincoln Division.]

GEO. H. THUMMEL,
Clerk of the Circuit Court of the United States for the District of Nebraska,
By J. H. McCLAY, *Deputy.*

Allowed by

M. B. REESE,
Chief Justice of the Supreme Court of the State of Nebraska.

O. K.

FAWCETT.
BARNES.

212 [Endorsed:] In the Supreme Court of the State of Nebraska. No. 15,148. Writ of Error. C., B. & Q. R. R. Co., vs. Wilbur I. Cram. Supreme Court of Nebraska. Filed Dec. 3, 1910. H. C. Lindsay, Clerk.

213 And on the same day there was approved and filed in the office of the Clerk of said Supreme Court a certain Supersedeas Bond in the Sum of $1000., in the words and figures following, to-wit:

In the Supreme Court of the State of Nebraska.

No. 15148.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, Plaintiff in Error,
vs.
WILBUR I. CRAM, Defendant in Error.

Supersedeas Bond on Writ of Errors.

Know all men by these presents, that we, Chicago, Burlington & Quincy Railroad Company, as principal, and United States Fidelity & Guaranty Company, a corporation organized under the laws of Maryland and duly authorized to transact the business of writing surety bonds in the State of Nebraska, as surety, are held and firmly bound unto Wilbur I. Cram in the sum of One Thousand Dollars ($1,000) to be paid to Wilbur I. Cram, defendant in error, his representatives and assigns, to the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 3rd day of December, 1910.

Whereas, the above named plaintiff in error has prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the Supreme Court of the State of Nebraska in the above entitled action.

214 Now, therefore, the conditions of this obligation are such that if the Chicago, Burlington & Quincy Railroad Company shall prosecute its writ of error to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; otherwise to remain in full force and favor.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,
By HALLECK F. ROSE,
Its Attorney of Record in said Case.

[SEAL.]

THE UNITED STATES FIDELITY AND GUARANTY COMPANY,
By W. A. YONSON,
Its Attorney in Fact.

The above and foregoing bond is hereby approved and it is ordered that the same operate as a supersedeas.

M. B. REESE,
Chief Justice of the Supreme Court of the State of Nebraska.

Endorsed: 15148. Cram v. C., B. & Q. R. Co. Supersedeas Bond. Supreme Court of Nebraska. Filed Dec. 3, 1910. H. C. Lindsay, Clerk.

215 And on the same day there was made to issue out of the office of the Clerk of said Supreme Court a certain Citation, which said original citation and acceptance of service thereof is hereto attached and is in the words and figures following, to-wit:

216 In the Supreme Court of the State of Nebraska.

No. 15148.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, Plaintiff in Error,
vs.
WILBUR I. CRAM, Defendant in Error.

Citation.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to Wilbur I. Cram, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington within thirty days from the date hereof, pursuant to writ of error filed in the Clerk's office of the Supreme Court of the State of Nebraska, wherein Chicago, Burlington & Quincy Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Manoah B. Reese, Chief Justice of the Supreme Court of the State of Nebraska, this 3rd day of December, 1910.

M. B. REESE,
Chief Justice of the Supreme Court of the State of Nebraska.

217 Service of the within citation and the receipt of a copy thereof, are hereby accepted and acknowledged this 3d day of December, 1910.

E. J. CLEMENTS,
Attorney for Wilbur I. Cram, Defendant in Error.

Supreme Court of Nebraska. Filed Dec. 3, 1910. H. C. Lindsay, Clerk.

[Endorsed:] No. 15,148. In the Supreme Court of the State of Nebraska. C., B. & Q. R. R. Co. vs. Wilbur I. Cram. Citation. Supreme Court of Nebraska. Filed Dec. 3, 1910. H. C. Lindsay, Clerk.

218 And on the same day said citation theretofore issued out of the office of the Clerk of said Supreme Court was returned and filed in the office of said Clerk with service endorsed thereon in the words and figures following, to-wit:

Service of the within citation and the receipt of a copy thereof, are hereby accepted and acknowledged this 3rd day of December, 1910.

E. J. CLEMENTS,
Attorney for Wilbur I. Cram, Defendant in Error.

Supreme Court of Nebraska. Filed Dec. 3, 1910. H. C. Lindsay, Clerk.

219 SUPREME COURT,
State of Nebraska, ss:

I, H. C. Lindsay, Clerk of the Supreme Court of the State of Nebraska, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of Wilbur I. Cram, appellee, vs. Chicago, Burlington & Quincy Railway Company, appellant, No. 15148, and also of the Opinions of the Court rendered therein as the same now appears on file in my office.

I further certify that the foregoing petition for writ of error, the writ of error, the citation and acceptance of service thereof, are the originals which were lodged in my office.

In testimony, whereof I have hereunto set my hand and affixed the seal of said Court at my office in the city of Lincoln, Nebraska, this 24th day of December, 1910.

[Seal Supreme Court of Nebraska.]

H. C. LINDSAY,
Clerk of the Supreme Court of the State of Nebraska.
By VICTOR SEYMOUR,
Deputy.

220 SUPREME COURT,
State of Nebraska, ss:

I, H. C. Lindsay, Clerk of the Supreme Court of the State of Nebraska, do hereby certify that there was lodged with me as such clerk on December 3, 1910, in the case entitled Wilbur I. Cram appellee, vs. Chicago, Burlington & Quincy Railway Company, appellant, No. 15148.

1. The original Bond of which a copy is herein set forth.
2. The copy of each of petition for writ of error, assignments of error, writ of error, citation.

In testimony, whereof I have hereunto set my hand and affixed the seal of said Court at my office in the city of Lincoln, Nebraska, this 24th day of December, 1910.

[Seal Supreme Court of Nebraska.]

H. C. LINDSAY,
Clerk of the Supreme Court
of the State of Nebraska,
By VICTOR SEYMOUR,
Deputy.

221 UNITED STATES OF AMERICA,
Supreme Court of Nebraska, ss:

In obedience to the commands *with* the within Writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case with all things concerning the same.

In witness, whereof, I hereunto subscribe my name and affix the seal of said Supreme Court of Nebraska in the city of Lincoln this 24th day of December, 1910.

[Seal Supreme Court of Nebraska.]

H. C. LINDSAY,
Clerk of the Supreme Court
of the State of Nebraska.
By VICTOR SEYMOUR,
Deputy.

Costs of Suit:

Appellant's costs $49.80.
Appellee's costs $116.20 for briefs.
Cost of Transcript $66.30.

H. C. LINDSAY,
Clerk of the Supreme Court
of the State of Nebraska,
By VICTOR SEYMOUR,
Deputy.

Endorsed on cover: File No. 22,458. Nebraska Supreme Court. Term No. 472. Chicago, Burlington & Quincy Railroad Company, plaintiff in error, vs. Wilbur I. Cram. Filed December 30th, 1910. File No. 22,458.